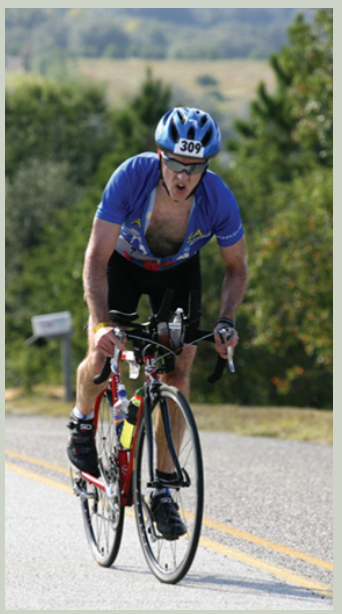
# The Alaska BAR RAG

VOLUME 31, NO. 1 | *Dignitas, semper dignitas* | $3.00 | JANUARY - MARCH, 2007



## How I finished (just barely) my first Iron Distance Triathlon

*By Todd Sherwood*



On October 21st, 2006, I began the Great Floridian Triathlon in Clermont, Florida. On October 22nd I finished it.

If there was a lesson learned in this race for me (and an encouragement to others contemplating something similar or facing any major challenge in life or the legal profession) it would be, in the words of Winston Churchill in the darkest days of WW II:" … never give in, never give in, never, never, never, never - in nothing, great or small, large or petty - never give in except to convictions of honour and good sense". Press on toward the mark friends. You can do it!

Since this account is being written in the *Bar Rag*, an august and dignified legal publication, there also needs to be some "lesson of law" presented, so here it is: I use the phrase "iron distance" rather than the more familiar "Ironman" because the term "Ironman" is trademarked and/or copyrighted by the World Triathlon Corporation (WTC) which owns it and puts on the world famous Ironman World Championship Triathlon in Hawaii and other Ironman titled races around the world. The Great Floridian Triathlon was not a WTC sanctioned race, and therefore they could not legally call it an Ironman race; rather, such races are generically referred to as an iron distance races, indicating that they, like the Ironman races, are of the same distance. It was sanctioned by USAT, the USA Triathlon organization, which has 70,000 members and, among other things, is responsible for the selection of American triathletes for the Olympics.

The Great Floridian Triathlon, like the more famously named Ironman races, features a 2.4 mile swim, 112 mile bike leg, and 26.2 mile run. It would be the first time I had ever attempted such distances in a triathlon.

I am not a jock. I am not an athlete. I was a 9th grade basketball dropout. I went out for track in 10th grade and was extremely average. That is the last time I participated in any organized sporting event until getting into triathlons. I have been doing triathlons for about 4 years now. My first triathlon was the 2002 Eagle River Triathlon. I was 44 at the

*Continued on page 6*

## LET'S HEAR IT FOR DRESS CODES PG. 22


## ADR's gone mainstream -- The future is here

*By Glenn Cravez*

Twenty years ago I heard this deprecating joke about Brazil: "Brazil is the country of the future… and always will be." It's been almost 20 years since I joined the effort of others to develop mediation in Alaska. Back then I wondered if mediation was the "wave of the future" in that same, "always will be" way.

The first time I took out a Yellow Pages listing for mediation, the listing mistakenly was placed under "Meditation." That made for some interesting phone calls. But we've come a long way in nearly 20 years. The future has arrived in terms of mediation's use in Alaska.

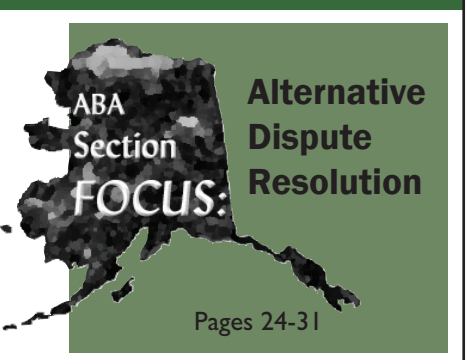
Alaska is following a national trend in the development of mediation and other forms of alternative dispute resolution (ADR). The Alaska Court System is a strong proponent and now offers several court-connected programs to help litigants solve their own disputes more effectively. The private market for mediation has grown considerably too, and many commercial, insurance, and family disputes get resolved through ADR. As the market has grown, so have the number of attorneys, mental health professionals, retired judges, and others offering conflict resolution services.

The growth of ADR isn't confined to the courthouse or adult legal system. Peer mediation programs have sprung up in many of our public schools. The University of Alaska offers classes

*Continued on page 24*

## FEATURED IN THIS ISSUE







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Anchorage, Alaska 99510

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PRESIDENT'S COLUMN

# Members enjoy real Bar benefits

*By John Tiemessen*

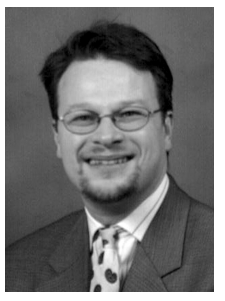
One of the fun things that the Bar President gets to do is meet diverse groups of members. This occurs through section meetings, local bar meetings, conventions, swearing in ceremonies and almost any gathering of lawyers.

At some point, the question is often posed – what do I get for my bar dues? This question is often worded differently, depending on the gathering and amount of alcohol served at the function, but the underlying message is the same: a number of members feel like they get very little in the way of tangible benefit for their bar dues. A number of members also get real loud (and one gets sort of "grabby") when they drink, but that's an issue for another article.

There are some easily identified direct benefits to members. CLE and convention are indirectly subsidized by dues. This is particularly true for events outside of Anchorage. However, when pressed, we must admit that most of the direct benefits to members are intangible. These include being one of the few professions that directly protects the public through an internal disciplinary process and the Lawyers Fund for Client Protection. (However, most of the lawyers who directly interact with the disciplinary process may not consider it a "benefit." I would guess that even fewer lawyers who are subject to the LFCP consider it a benefit.)

**At some point, the question is often posed – what do I get for my bar dues?**

A few years ago, the members passed a resolution that clearly mandated that the Board look for more ways to provide direct benefits to the membership. Since that time, the Board has worked on having more live CLE, reaching out to communities outside Anchorage, and has reaffirmed its commitment to geographical rotation of the bar convention.



**If Alaska joined the Casemaker consortium, access to this research would be provided free to all members.**

More recently, the Board heard a presentation by Casemaker (www.casemaker.us). Casemaker is a computerized research provider that provides research tools to state bar associations. The service would provide access to state and federal materials. The Federal Library contains: United States Supreme, Circuit, District, and Bankruptcy court opinions; Federal Court Rules; United States Code; Federal Code of Regulations; USC Bankruptcy Reform Act; and Links to Federal Court Forms. The contents of state libraries will vary, depending on what individual Consortium member states have requested. In general every state library contains: case law; statutes; codes; state constitution; and court rules.

Depending on the individual Consortium member state's agreement with Casemaker, some state libraries may include: local federal rules, reports, links to court forms, Attorney General Opinions, jury instructions, "unreported" opinions, bankruptcy decisions, ethics opinions, Worker's Comp opinions, environmental decisions, and other legal information as specified by the individual bar's requests.

If Alaska joined the Casemaker consortium, access to this research would be provided free to all members. While it may not supplant the current vendor you are using, most attorneys find that it satisfies 90% of their online legal research needs. Although it's nice to know it is available, most members don't need to access the Moroccan Law Review on a regular basis.

## The Annual Convention

Fairbanks is having a party and everyone is invited! The annual bar convention is May 2 – 4 at the Fairbanks Westmark. For those of you with Traveler's Inn flashbacks, I assure you the hotel has been completely renovated. By now you have received your convention materials in the mail. It is also available online at www.alaskabar.org. Click on the convention information link in the right box of the home page.

We are pleased to once again offer our special "2 for 1" Offer for new admittees.

A Bar member admitted before Jan. 1, 2002 and a member admitted on or after Jan. 1, 2002 can attend convention CLEs for just one registration fee (access to all, 1 day, or a half-day). The "2 for 1" offer does not apply to social events. Both members must fill out a separate registration form and submit them together. If you need help finding a lawyer to pair with, E-mail cleasst@alaskabar.org.

*Continued on page 3*

EDITOR'S COLUMN

# Agreeing to disagree: Where is the dissent?

*By Thomas Van Flein*

As most of you are aware, Chief Justice John Roberts will be joining us in Fairbanks in May for our annual convention. Notably, he spent December and January at the eight-week Maui Bar Association Convention, presumably with many of our Alaska Bar colleagues—okay, our plaintiffs' bar—who likewise regularly attend this function. The important thing is to make sure you are attending some bar function that has a better climate than your own as this facilitates better CLE learning.

By coming to Fairbanks in May, Chief Justice Roberts is demonstrating a sensible and practical trait that bodes well for his future decision making. Sure, Justice Scalia visited Fairbanks a few years ago, but not since Earl Warren came to Fairbanks (reportedly to take judicial notice of the status of the Second Amendment during duck season) has a judicial visitor from Washington created such a stir.

Everyone in Alaska appreciates someone who runs a tight ship. From a law office to a crab boat, or a patrol car to a dog sled team, cracking down on deadbeats, slackers and other free spirits is a way of life around here. The "Bong Hits for Jesus" case demonstrates precisely just how tolerant we Alaskans are of independent thinking.

That being said, the question has been raised whether Chief Justice Roberts' policy of encouraging unanimity in court decisions is as good as . . . he says it is. You may have read that he has been encouraging the Court to reach a consensus on opinions and reduce the number of split decisions and dissents. That has several obvious benefits, the most important one being that one party is left saying "I can't believe we didn't even get one vote."

Other benefits include more certainty in the law (or at least the appearance of more certainty, which is almost as good) and the reduction in the amount of "replacement speculation." Every time there is a 5-4 vote on something, those who get paid to talk about these things chime in with a "yeah, but if Justice So-and-So retires (or becomes comatose, or fails to take his meds) then this whole thing is back to the drawing board." So, unanimous decisions tend to discourage that type of media speculation. It is reported that under Chief Justice Roberts, the number of unanimous decisions almost doubled in 2006.

**Everyone in Alaska appreciates someone who runs a tight ship.**

But dissent, internal quarrels and ridiculous nitpicking is a way of life in America. Why should the Court be any different? After all, I thought we wanted our government to reflect the make-up of our country (it's true, I heard it on NPR), and our country is made up of people who can hardly agree on anything. And I know that many of you will disagree with that.

Commentator Edward Lazarus noted that "the real issue is not unanimity or lack thereof. Instead, the Court runs into trouble either when it is so fractured that its decisions leave the law confused and unsettled, or when it is so narrowly divided and politically polarized that the internal divisions erode the Court's status and authority." That criticism (at least the comment about leaving the law confused and unsettled) can be applied to a number of unanimous decisions, however, and is not limited to split decisions. Further, it is the confusing and unsettling appellate decisions that have provided lawyers across the country with the opportunity to achieve a standard of living far beyond what their skills would otherwise merit.

**No one said being disagreeable is without consequence. I think we all can agree on that.**

I say to those justices who remain secretly disgruntled (I know you are out there), bursting at the seams to disagree with years of precedent, hoping to shine your torch of intellectual analysis on the misguided assumptions of the majority, aching to set the record straight and pointing out once and for all the folly of the lower courts (particularly the Ninth Circuit): "do it." Write that dissent. Vote your conscience. Agree to disagree. But don't be surprised when the power is shut off to your office and the funding for your law clerks is withdrawn.

No one said being disagreeable is without consequence. I think we all can agree on that.

The Alaska BAR RAG

The *Alaska Bar Rag* is published bimonthly by the Alaska Bar Association, 550 West 7th Avenue, Suite 1900, Anchorage, Alaska 99501 (272-7469).



| Publication Dates | Editorial Deadlines |
|---|---|
| January-March | Feb. 10 |
| April - June | May 10 |
| July - September | Aug. 10 |
| October - December | Nov. 10 |

**Board of Governors meeting dates**
April 30 & May 1, 2007
May 2 - 4, 2007 Annual Convention - Fairbanks

# Member benefits

*Continued from page 2*

Please include your name and bar member number. The Alaska Bar Association will provide you with contact information.

Past convention CLE offerings have been criticized as too esoteric or too narrowly focused. We have worked hard to offer "meat and potato" CLEs that will offer substantive materials to all segments of the bar. Various CLE offerings target litigators, public lawyers, new lawyers, and private practitioners.

Our keynote speaker, Chief Justice John Roberts, will speak at the May 3 awards banquet. We are expecting this event to sell out from interest from the public so be certain to book early, especially if you have friends who want to attend.

Finally, while the editor and my partner, Tom Van Flein, has assured me that this is not my last column, it is my last as President. It has been a tremendous honor and privilege to serve as President of this Association. There is unfinished business, particularly a diversity initiative that is still in its infancy that I will continue to work on after this year is over (and likely for the next eight to 10 years). However, I feel that we have accomplished our goals of the past year of crafting an organization that is responsive to member needs while still recognizing its primary obligation of serving and protecting the public.

The next President's Column article will be written by Matt Claman, the current President-Elect. I expect that his articles will be funnier and less plagiarized than mine. However, I also expect that he will continue the tradition of service and responsiveness to the membership.

# TVBA Resolution Regarding Courthouse Security

WHEREAS the Alaska Court System has determined that there is a need for courthouse security that requires, among other things, security screening to enter the public entrance of the court buildings in certain communities;

WHEREAS the Court System security currently exempts members of the judiciary and employees from security screening;

WHEREAS any exemption diminishes or even obviates the efficacy of security screening, elevates the appearance of security over actual security, and creates an appearance of privilege for court employees and the judiciary; and

WHEREAS the only practical way to resolve this appearance of privilege and have true courthouse security is to have all individuals with access to the courthouse go through screening;

BE IT RESOLVED that the Alaska Court System should require all non-peace officers who access courthouses with security screening to pass through security screening. There specifically should be no exceptions for court employees or members of the judiciary.

Dated this 5 day of March, 2007 at Fairbanks, Alaska.
Terrance W. Hall
President, Tanana Valley Bar Association
*(For the Bar convention annual meeting)*

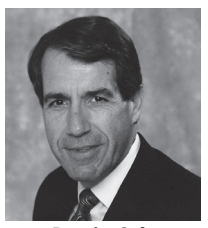
# 2007 Bar Convention in Fairbanks — The Golden Heart City

**Wednesday - Friday, May 2, 3, and 4**
**Westmark Fairbanks Hotel & the Rabinowitz Courthouse**

Check the Bar website for more information (www.alaskabar.org).

CLEs -- Get all 12 recommended CLE credits at the Bar Convention!

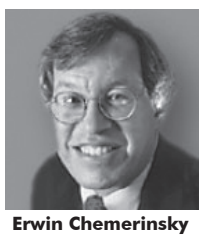
## WEDNESDAY, MAY 2


Dustin Cole

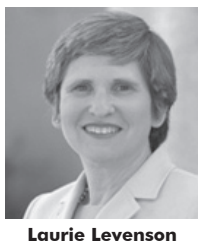
- The 7 Building Blocks of a Highly Efficient Practice – Productivity Strategies for Private and Public Attorneys – Dustin Cole, Nationally-Known Trainer for Legal Organizations, Founder of Attorneys Master Class
- 25 and 50 Year Pin Presentation and Lunch
- Ethical and Successful Client Development (includes 1 hour of ethics)- Dustin Cole
- CLE for Public Attorneys – The Nuts & Bolts of Getting Records – A panel of experienced lawyers and judges
- CLE for New Lawyers – The Business Side of Running a Law Firm: What Partners Want their New Lawyers To Know – A panel of experienced practitioners and industry experts
- Opening Reception --UA Museum of the North

**Don't miss the Pro Bono Art Silent Auction!**

## THURSDAY, MAY 3


Erwin Chemerinsky

- U.S. Supreme Court Opinions Update - Professors Erwin Chemerinsky and Laurie Levenson
- Alaska Bar Annual Business Meeting
- Alaska Constitutional Law Update – Professor Erwin Chemerinsky
- Evidence: How To Get It In! – A panel of District and Superior Court Judges
- Electronic Discovery: Trends & Developments You Need to Know – Judge Timothy Burgess and Gregory Fisher
- Awards Banquet and Reception – Keynote: Chief Justice John Roberts, Supreme Court of the United States


Laurie Levenson

## FRIDAY, MAY 4


Judge Susan Connor

- Juries: Reexamining the Box -- Innovations in Approaches to Juries – Judge Susan Connor, Superior Court of Los Angeles
- Bar Networking Lunch
- Federal Appellate CLE with Chief Justice John Roberts

**Chief Justice John Roberts, U.S. Supreme Court Awards Banquet Keynote Speaker**

**Make your hotel reservations by April 15, 2007**

**The Westmark Fairbanks Hotel is the convention hotel. A block of rooms has been reserved for Bar members. The rate is $75 single or double plus tax.**
**Call 800-544-0970 to make your reservation.**
**Westmark Fairbanks Hotel**
**813 Noble Street**
**907-456-7722**
**Central Reservations: 800-544-0970**

**Watch the Bar website www.alaskabar.org for more information!**
**E-mail us at info@alaskabar.org or call us at 907-272-7469.**
**Brochures will be mailed in late January/early February.**

**Note: There will be NO Fun Run/Walk this year.**

Don't Forget – ***2 for 1 Special*** – A Senior Member of the Bar and a New Lawyer (admitted in the last 5 years) can attend convention CLEs for just one registration fee. Watch for details in the convention brochure!

THE KIRK FILES

# Mission: Implausible (or, what profiteth a man...)

***By Kenneth Kirk***

*Press any key to begin program*

"Good morning, Mr. Phelps.

"Norman Limbagi was driving to work last September, when he was struck by a delivery truck insured by our client. An external security camera from a nearby store clearly shows that Mr. Limbagi had the green light. He sustained permanent paralysis from the waist down, as well as damage to his left arm, the loss of several teeth, and some facial disfigurement which it has been possible to only partially correct. At age 42, Mr. Limbagi had been making over $40,000 a year as a repairman, but he can no longer work in that field due to his injuries. He has a wife and three children; she has been staying at home for the last 16 years to raise their children.

"Unfortunately, the coverage from our insurance client is over $2 million, and they don't want to pay the full policy limits. Their adjuster has been digging, but has only come up with the facts that Mr. Limbagi and his wife had been having marital difficulties, that their teenage son has been in trouble with the law, and that Mr. Limbagi had been reprimanded at work five years ago for using the company postage meter for his personal mail.

**"Your mission, should you choose to accept it..."**

"Your mission, Jim, should you choose to accept it, is to use these arguably irrelevant facts to convince the Limbagi's to accept an offer of less than $500,000. In doing so, you should keep in mind that their attorney is young and inexperienced, and may not yet have a well-developed sense of what facts are truly important."

*Press Y to accept. Press N to decline.*

*You have pressed N to decline. Please confirm.*

"Really? Because I thought that was a really good one. All right, well how about this:

"Good morning, Mr. Phelps.

"Julia Chemosky fell down a flight of stairs at a retail establishment insured by our client. The responding police officer noted a pool of cleaning solution which had leaked from a bucket nearby, and on which Ms. Chemosky appeared to have slipped.

"In addition to the normal cuts and bruises one would expect, Ms. Chemosky sustained a serious injury to her left knee. An otherwise healthy 33 year old who used to run distance races, she can now walk only with the use of a cane, and that after two years of intensive physical therapy.

"The establishment is only covered for $200,000 per incident, and normally the insurer would simply accept the policy limits offer which has been made. However Ms. Chemosky was foolish enough to hire Lawrence "Crazy Larry" Cleihopper, a notorious ambulance-chaser who runs ads on late night television, as her attorney. Mr. Cleihopper has not taken a case to trial in more than 20 years. He doesn't really prepare for trial, does little discovery, and sometimes fails to show for depositions. His employees usually quit after a few months, and there are rumors that he has a drinking problem. Other insurance defense attorneys have been successful in pushing things to the brink of trial with him in order to force a cheap settlement.

"Your mission, should you choose to accept it, is to take this case right down to the day before trial, then settle it for less than $100,000. We suggest you regularly flood Mr. Cleihopper with discovery requests, including requests for admission of facts which are clearly contested, in hopes that he will blow some deadlines and thus create more pressure on them to settle. Offer more than $50,000 early on, to whet his appetite, but then don't move up until trial is imminent.

*Press Y to accept. Press N to decline.*

*You have pressed N to decline. Please confirm.*

"Oh come on. You're killing me here. Well then this is the last one I have available:

"Good morning, Mr. Phelps.

"Jim Thornapple was driving home late at night when he lost control on an icy road and ran into a telephone pole. He sustained severe neck and back injuries that plague him to this day, permanent facial disfigurement, and several broken bones. More importantly, he stopped breathing for several minutes before being revived by the paramedics, so he now has serious brain damage. He is 29 years old and was a successful aircraft mechanic who was only a few classes short of a college degree, which he was working on through night classes. He was also an accomplished amateur poet, however he can no longer form words so that is out of the question. He has 4 children but his wife has left him since the accident. Did I mention he was a concert cellist? That too.

**"Good luck, Jim. As always, if any of these internal communications are caught or captured, the firm will disavow any moral responsibility for your actions."**

"On the other hand he had only $100,000 in auto insurance coverage.

"Your mission, should you choose to accept it, is to bill just under 80 hours of time on the case, since that is the figure beyond which our insurance client starts asking questions, and then make the policy limits offer which everyone knows this case justifies."

*Press Y to accept. Press N to decline.*

*You have pressed Y. Please confirm to accept this appointment.*

"Good luck, Jim. As always, if any of these internal communications are caught or captured, the firm will disavow any moral responsibility for your actions.

*"This CD will self-destruct in 5 seconds..."*



## Serve on a Bar committee

Each year the terms of several members on each of the Association's committees expire and the incoming President must appoint replacements to fill the vacancies. Below is a list of the committees of the Bar seeking volunteers. Take a minute to review the list and consider seeking an appointment or reappointment.

More information on the committees' work is on the Bar website; follow the link from the home page to committee descriptions and the application form at www.alaskabar.org.

- Alaska Bar Rag
- AK Rules of Professional Conduct
- Area Discipline Divisions
- Bar Polls/Elections
- Continuing Legal Education
- Ethics
- Fee Arbitration Panels
- Historians
- Judicial Independence
- Law Examiners
- Law Related Education
- Lawyers' Assistance
- Lawyers' Fund for Client Protection
- Mediation Panels
- Pro Bono Service
- Tutorial

Application forms are due March 31.

*Support Bar Rag Advertisers*

## NOTICE TO THE PUBLIC

By order of the Alaska Supreme Court,
entered December 11, 2006

**ROBERT C. NAUHEIM**
Member No. 8911076
Anchorage, Alaska

is transferred to disability inactive status
due to a physical disability
effective December 11, 2006

Published by the Alaska Bar Association,
P. O. Box 100279, Anchorage, Alaska 99510-0279
Pursuant to the Alaska Bar Rules.

ECLECTIC BLUES

# Hooligans of the press

*By Dan Branch*

Many of the Juneau social battles play out in the letters to the editor section of the Juneau Empire. Whether they are writing about a fight over free speech at the high school or dog poop on the hiking trails, combatants love to spread pain and distain with their letters to the Empire. When the paper launched an edgy entertainment section called "Hooligan," I expected that the epistles of angry Hooligan critics would fill the op-ed page. They did, for awhile.

The first editions of Hooligan inspired letter writing by running pieces about drunkenness, drugs, and the dating habits of young adults. One issue ran an advice column/blog authored by someone with the *nom de plume* of "Random Sex," entitled "Should You or Shouldn't You." For those who know the despair about the damage alcohol abuse visited upon Alaskans, there was a column discussing hangover cures and another called "Half in the Bag--Notes of a Social Drinker." I wanted to send in my own letter after the Hooligan editor ran a story describing his experience of taking "Sally D," the street name for a hallucinatory drug that is too new to make the Title 11 list of controlled substances.

**Unfortunately, the insert also provides our main source for movie reviews, stories on local arts and entertainment and the time and dates of the high school plays.**

Anti-Hooligan letters to the editor reached a crescendo with an article describing a Tupperware style party where attendees were encouraged to view and then purchase sex toys.

The *Empire* did not yield to the letter writers and change the Hooligan format even after the sex toys story. After that anti-Hooligan letters became hard to find in the paper. Maybe they gave up or simply stopped reading Hooligan. The February 8 edition provided plenty of stuff to outrage parents, like an illustrated "how to piece" on condom use and another entitled, "Antidote for Bear despair--free STD exam."

**Reporters, even those of us who wrote for the Verdugo Hills High School Yucca had a responsibility to the community served by their paper.**

I sympathize with the ant-Hooligan letter writers. I don't want my kid and her friends to read this stuff. If Hooligan only published naughty articles it would not be so bad. Unfortunately, the insert also provides our main source for movie reviews, stories on local arts and entertainment and the time and dates of the high school plays.

Every Thursday morning when Hooligan arrives wrapped in the *Juneau Empire* I find myself channeling my high school journalism teacher. He taught us that reporters, even those of us who wrote for the Verdugo Hills High School Yucca had a responsibility to the community served by their paper. Quite a contrast to the folks that bring us the Juneau Hooligan and the tabloid journalists who justify publication of the most intimate details of a celebrity's private life as a way of satisfying the public's right to know.

Hooligan's survival attests to its commercial success and advertiser's willingness to support it. The insert must find acceptance among its target audience. Now I'm close to channeling Cal Berkeley school administrators in 1964 who watched in dismay as Mario Salvo swore for free speech.

Mr. Salvo and the other free speech advocates fought to expand our constitutional rights of free speech. I can honor that. However, what price does society pay when mainstream pressmen use those constitutional rights to be naughty in public? I'm not advocating for a diminishment of our free speech rights. However, would our society benefit if those rights were not squandered on Anna Nicole Smith stories or a piece on why the reader should try Sally D before use of it is criminalized?

**What price does society pay when mainstream pressmen use those constitutional rights to be naughty in public?**

There is some good here. Hooligan's excesses give parents a chance to talk about the media and its impact on their society. For that I am thankful. Teachable moments are harder to come by in our house as my daughter finishes up her senior year in high school.

## NOTICE

- **OUT-OF-STATE BAR MEMBERS**
- **IN-STATE INACTIVE & RETIRED BAR MEMBERS**

The Alaska Judicial Council includes active out-of-state attorneys and inactive and retired attorneys who reside in Alaska in its surveys about judicial applicants and judges. Please note that the Council will no longer be using paper surveys to survey these attorneys. Active out-of-state attorneys and inactive and retired attorneys in-state may still participate in Judicial Council surveys electronically via the Internet. Active out-of-state attorneys and inactive and retired attorneys in-state who would like to participate in Council surveys but who have not previously provided an e-mail address to the Council or to the Bar Association must provide the Council with a current e-mail address. Attorneys may contact the Council by phone, mail, fax, or e-mail at: Alaska Judicial Council, 1029 W. Third Ave., Ste. 201, Anchorage, Alaska 99501; phone: 907-279-2526; fax: 907-276-5046; e-mail: lcohn@ajc.state.ak.us. (Reasonable accommodations will be made for attorneys who cannot participate electronically as a result of a disability.)

# Never give in

*Continued from page 1*

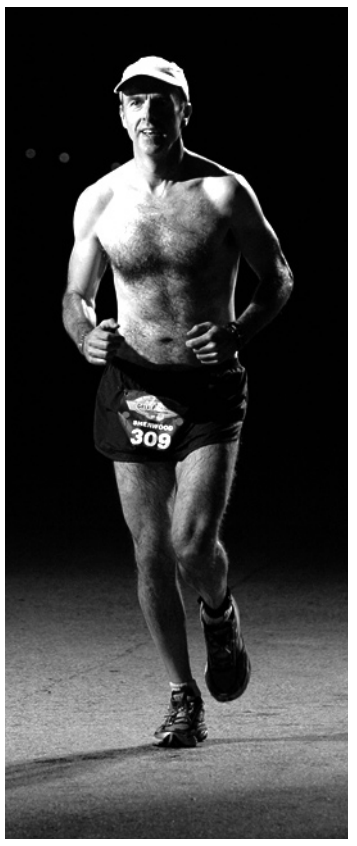
time. Since then I have done many other triathlons of varying distances including three half-iron triathlons, as well as quite a few ordinary bike and running races.

Before this I always tried to exercise off and on but never could seem to stick with it until a friend encouraged me to do the Eagle River Triathlon. Having a goal race gave me a reason and purpose for all the exercise and a training schedule that told me what to do and when to do it. Four years ago I could barely swim two laps in a pool and could only do so with my head above water, having never learned to swim properly. I was a scuba diver and was very comfortable in the water, but just never learned to swim properly. That was challenge number one. It took a lot of frustrating self-taught sessions in the pool but I eventually did learn to swim properly; not very fast but I finally got the stroke down. I was a very intermittent runner and never for more than 30 minutes. I was a recreational biker (mountain bike only) who rarely rode more than 30 to 60 minutes at a time. So if you have read this far and are thinking about trying a "tri", but lack of accomplishment in any of the three disciplines is holding you back don't let that stop you – you CAN overcome!

I picked this race for several reasons. It was in the fall of the year and that worked best for my training schedule and other life plans for the year. I also like to have a main event in the spring and one in the fall to train towards to make sure I stay fit throughout the year. Also, this race, unlike many other iron distance races did not require previous acceptable qualifying times to get into. In addition, I was concerned about the weather. I wanted to avoid the heat of the summer if at all possible. Two of the three half-irons I had done were in blistering hot weather (one of which was in Texas in the fall with record setting unseasonably warm weather) and I didn't want to fight hot weather for my first iron distance event. It appeared that Florida in October would be about right weatherwise with temps in the high 70s to low 80s and mild humidity. And to end the suspense early - yes, gentle reader, it turned out that race day featured a record setting unseasonably high 92 degrees with 94% humidity! Fellow triathletes at the event nearly fell over with the giggles when they heard I had been training in fall Alaska weather in 45 to 55 degree temperatures!

**I picked this race for several reasons. It was in the fall of the year and that worked best for my training schedule and other life plans for the year.**

I built up a training base with extra swimming in the winter as well as running outside and biking on the trainer inside. Once spring arrived I picked up the intensity so that I was ready to start a 13-week training program in early July. I stayed on a very regular training schedule and felt ready to go by the final week before the big race.



**Todd Sherwood on the home stretch.**

I arrived at the race venue in Clermont, Florida about a week ahead of time to acclimate and to scout out the course. The Great Floridian Triathlon staged its swim leg in a lake that, according to the web site, received some kind of environmental award. I'm not sure why it got the award but it certainly wasn't for clarity; it had nearly the lowest visibility of any lake I have ever been in. Staring into it was like looking into a mug of dark tea. When swimming I could barely make out my fingertips on the down stroke. That fact, plus the nearby sign warning of the presence of alligators, made for a nervous training swim!

I also spent the better part of one day biking the run course and then driving the bike course. The run course featured an out and back leg of about five miles and then three 7 mile laps around the lake. Similarly, the bike course consisted of two nearly identical 56-mile loops through rolling rural orange growing country.

With the race scheduled to begin at 7:30 a.m. I got there a few minutes after 6 a.m. to make sure everything was in place and I was fully ready to go. By 7:20 there were about 400 of us iron distance people in the beach area ready to go. A few hundred more doing a half-iron race would follow us into the water about an hour later.

Just before the race start someone sang a beautiful live rendition of the National Anthem. The sun was just beginning to rise as the notes of the song drifted over the lake and we gazed out towards an American flag flying from a nearby boat. With that the race began.

The gung-ho and elite racers plunged frantically into the water as if their very lives depended on maximum thrashing, while the slower and less skilled swimmers (of whom I am chief) walked casually into the water staying to the back and outside of the pack. (Having once made the mistake of getting pounded on in the middle of a swimming mob, I had no desire to repeat that experience). The 77 degree water was cool enough that most of us chose to wear a wetsuit – both for the added warmth and the added buoyancy. This was a two-loop buoy marked course. After the first 1.2-mile loop we came out of the water for a short run along the beach and then back into the water for the second loop. There was a cutoff time for the swim of two hours and 45 minutes, meaning that anyone still in the water by 10:15 would be disqualified. Slow though I am, I managed to finish a few minutes after 9.

**With 112 miles of biking ahead of me, I wanted to be sure I was comfortable, ready and well-slathered in sun screen.**

With the swim leg done I headed up the beach. I declined the help of the eager volunteer wetsuit strippers. If I had pulled my wetsuit to my waist and thrown myself on my back before them they would have happily yanked the wetsuit the rest of the way off. Foregoing that help, I grabbed my pre-placed bike gear bag from the rack and went into the changing tent. I took about 20 minutes to get ready for the bike leg. A highly competitive triathlete will just throw his helmet on, get into his bike shoes and head off in what he swam in. I am not amongst that elite bunch. I was in for the long haul and for the joy of simply finishing.

With 112 miles of biking ahead of me, I wanted to be sure I was comfortable, ready and well-slathered in sun screen. Although I had put on sunscreen before the swim I carefully reapplied more – Coppertone 50 SPF factor waterproof and sweat proof sunscreen to be exact. Having goofed on the sunscreen in the Honu Half-Iron Triathlon in Hawaii (and getting a nasty burn with the attendant consequence of wearing a white race number "tattoo" for about six months afterward!!!) I wanted to make sure I was protected. I put on dry bike shorts and my spiffy bright blue bike jersey with "Alaska" emblazoned front and back. The jersey resulted in my getting many nice encouraging remarks from riders and spectators alike; including one lady who rolled her window down as she drove by and yelled "you go, Alaska!" The good news was that in spite of being out in the blazing hot sun all day I did not burn!

The bike course, while rural, did go through a couple of small towns. The pavement varied from brand new to some places that made me think I was back in Alaska! Although the bike course was advertised as relatively flat and fast it did feature some gradually rolling hills as well as several that were much more than "gradual". The worst, about 30 miles into the course, was a monster called Sugarloaf Mountain; one of the highest points in Florida. I had seen pictures of it on the race website and thought maybe its apparent steepness was a trick of zoom photography - I hoped!! Alas, after driving the course I realized this was not to be. Considering that I was in the seemingly flat state of Florida, I was surprised to find there was vast view from the top of the hill. I didn't know such a thing existed in Florida. Although the hill itself is not terribly high, the pitch is quite steep.

To add insult to injury there were 3 fairly significant hill climbs in the few miles before Sugarloaf. Sugarloaf goes up at a steep angle with no breaks for about half a mile. And keep in mind that by the time of the first bike loop it was in the mid to high 80s with sunny skies and increasing humidity. When I turned the corner and got my first view of the road up Sugarloaf, I was shocked to see at least 20 riders walking their bikes up the hill. I don't think I have ever seen a road bicyclist walking a bike up a paved hill. This did not bode well.

I managed to gut it out and ride the whole way up the hill; sweat pouring off of me and down my hands to where I feared being able to hang on to the handlebars. (The accompany-

*Continued on page 7*

## Race into Law Week!

**Young Lawyer, Race Judicata organizer, and speedy runner Bill Pearson races in court appropriate attire.**

The Young Lawyers Section of the Anchorage Bar Association will hold its third Race Judicata at 10 a.m. on Sunday, April 22 at Westchester Lagoon in Anchorage.

Race Judicata is a 5-kilometer fun-run/walk organized by the Young Lawyers to raise awareness and funds for Anchorage Youth Court. Last year's 150 racers raised over $2000.

### *Think you're fast enough?*

Entry fees are $15 person with online registration at www.active.com , in-person at Skinny Raven on Friday April 20 from 4-7pm, or $20 on race day. Even if you're not at the front of the pack, you may be eligible to win a special award given to the public agency and law firm with the greatest number of employees entering the race to take home one of two (soon to be coveted) "Best Legal Representation" prizes!

# Never give in

*Continued from page 6*

ing picture of me grimacing on the bike was taken just as I neared the top). As I crested the hill I was feeling rather pleased that this Alaskan, who had trained in the coolness of Alaska, was hacking it in the mighty heat wave of Florida (don't worry - as Proverbs 16:18 says "Pride goeth before destruction, and an haughty spirit before a fall" (KJV) and my "fall" was about to come).

I finished the first of the two 56-mile bike loops in 3.5 hours (an hour and half ahead of the first loop cutoff time) and was surprised to find that I felt quite spunky and full of energy. I was not even feeling mentally down about facing the second lap as I had expected. "Maybe the second lap won't be so bad," says I. Hah! I could not have been more wrong.

I plunged into the second loop feeling okay, but things started hurting with about 82 miles under my belt and 30 to go…and Sugarloaf part deux was yet to come, looming in my mind like a dark malevolent force. I wondered if I could or should…ride it a second time or if I should just push the bike and walk up. I again managed to ride up it albeit with a bit more struggle this time. I passed one fellow who I had been playing "passing tag" with earlier. In spite of my pain I felt a bit smug, thinking I was likely leaving him behind for good. Sigh…ok…full confession time. According to the age number on his leg he was 69 (maybe 59?)…and I am uh…49… sigh…and…(do I have to admit this?)…later on in the bike leg I was hurting so much that he passed me and left me behind for good!

**I plunged into the second loop feeling okay, but things started hurting with about 82 miles under my belt and 30 to go…and Sugarloaf part deux was yet to come, looming in my mind like a dark malevolent force.**

In case any of you are seeking the answer to one of the central questions of life – namely, "on a really long bike ride of say, 112 miles, are there ultimately any comfortable positions to be found on the bike?" The answer is unequivocally "NO!" I was hurting everywhere there was to hurt by the time I was finishing up the last 20 miles.

I am not sure I realized it at the time but the heat was really getting to me also. During the first loop I stuck to my nutrition and hydration schedule pretty well. By the second loop I was starting to feel I just couldn't take much more in. I did keep drinking… mostly Gatorade but it may not have been enough. I also took some salt tablets but again perhaps not enough. In addition, the aid stations frequently did not have anything cold or they were out of Gatorade or out of water. It was critical to have cold liquids to keep the body core temperature down, yet in spite of a week's worth of warning about the weather they often didn't have enough. By this time it was mid-afternoon and the temperature and humidity were both in the low 90s. At one station I literally got the last cup of water and I had to scrounge more Gatorade from warm discarded half-empty bottles lying around.

I finally coasted in the last mile of the bike loop with a total bike leg time of just under 8 hours. I picked up my run gear bag and went in to the changing tent. I didn't realize how much the heat had gotten to me until I got into the changing tent (with nary a fan in sight and no air moving, in hindsight it probably was not the best place to be). I sat on a chair to start changing and realized quickly that if I didn't go to the grass and lay flat on my back, I was going to fall off the chair. I was somewhat nauseated but mostly just completely lacking in energy. A volunteer asked me if I was ok. I got some water from him, took some salt tabs and water to drink and then poured water on myself. I heard one guy saying he was going home; they had to pull him off the bike course from heat exhaustion so he was disqualified. I thought "how lucky for him." And meant it! Such was my mental state at the time. I finally got up and wandered down to the lake and got in up to my neck to cool off.

I was feeling very sorry for myself and very down mentally as well as physically. Even though I had 7 hours plus remaining the race at this point I still assumed I would probably not even attempt to walk the run portion and even if I did I would not finish. As I sat up to my neck in the cool water a little girl swimming there asked me: "Hey mister, did you finish the ironman?" Sigh. The last thing I wanted to do was talk to anyone. Talk about a blow to the ego! Just when I was busy trying to feel sorry for myself and working on giving up too! She asked how far it was. I told her and I tried to explain that I had done the swim and bike parts, but I had not done the run so I had not finished yet. She didn't seem to quite understand and said "Congratulations!" This started me thinking that I really would like to finish, put on the finishers t-shirt and hear "congratulations" for real. I finally thought I would go back and see if I could summon the energy to at least start walking.

I changed into running gear, drank some Coke (normally I never touch the stuff but "Coke is it" on the run portion friends – instant energy and no digestive distress!), choked down a high carb gel pack and started walking. Normally a triathlete wants the transition from bike to run to be very swift. In this case I took 45 minutes I was so out of it.

I started off still feeling very discouraged. At this point I had just under 7 hours to do the marathon, however my mood was so dismal that I assumed (without even trying to figure it out) that there was no way I could finish but I might as well walk and see if I could start running at some point. My original plan had been to run five minutes and walk one minute and hopefully finish the run in five hours or less. This quickly went by the wayside and I was forced to walk most of the first few miles and just run a few minutes here and there. I slowly found I could tolerate more coke and water and started taking more salt tabs.

**I think I learned as much about mental/emotional stamina as about physical stamina. And even more than that I learned to not give up…to not give in….**

I finally made it through the first five miles only to face 3 laps around the lake…or 3 HUGE 7 mile laps as my brain saw it! So there I was at the five-mile point, still quite glum and certain I would not make it. I was still seriously contemplating washing out, so blue was I. The sun set about 5:30 and it soon became pitch black.

I was walking in the dark when a guy ran by me. He got about 10 yards ahead and then said: "Hey thanks" (I hadn't done a thing to be thanked for) and came back and started walking with me (at a good clip which made me pick up my pace) and just started chatting in a friendly way. We talked about Sugarloaf Mountain a bit; he noted that only by praying was he able to get up the hill. He told me he had just one lap left on the run. I told him I didn't think I would finish. He was quite encouraging and assured me I had enough time to finish. With that he continued on his final run around the lake.

I found it very interesting, how between the little girl in the lake and this guy, I got just the emotional boost I needed to keep pressing on toward the mark. Sometimes the good Lord seems to bring people and circumstances into our lives to help us out, just when we need it most! From that point on I began to run more, walk less and feel better and stronger as time went on. I began running in 10-minute blocks instead of a few minutes at a time. I began to think I might be able to finish. Even my long lost friends, the endorphins, seemed to have returned! It got to the point where it was not unusual for people to comment on how strong I looked running as I came in to the aid station (if only they had seen me on the floor of the changing tent!).

Even though the sun was down it was still quite warm and humid. Staying cool continued to be hugely important. To keep cool I ran without a t-shirt and at every stop I would pour cold water on my head and down my back. (In the running picture, unlike the biking picture, I am smiling because I was only about 100 yards from the finish line at that point).

Finally, 16 hours, 34 minutes, 44 seconds and 8800 calories (no joke!) from when I started at 7:30 a.m., and just after midnight, I crossed the finish line about an hour ahead of the final cutoff. It was a great relief to be done…to have simply finished the race. I later learned that about 30% of the 400 iron distance starters washed out due to the heat. I think I learned as much about mental/emotional stamina as about physical stamina. And even more than that I learned to not give up…to not give in….until the task is truly done.

And so, for anyone thinking of doing a triathlon or anyone facing a big case or any other major challenge in life, I would just encourage you, as it says in Hebrews 3:1 (KJV) to "… run with patience the race that is set before you" and in keeping with Winston Churchill's axiom, "never give in, never give in, never, never, never… never - never give in!"

*(Todd Sherwood is Special Counsel for the Government and External Affairs Division, Office of the Mayor, North Slope Borough.)*

## DID YOU KNOW…

That the members of the Lawyer's Assistance Committee work independently?

SINCE 1896
ALASKA BAR ASSOCIATION

If you bring a question or concern about drug or alcohol use to any member of the Lawyer's Assistance Committee, that member will:

1. Provide advice and support;
2. Discuss treatment options, if appropriate; and
3. Protect the confidentiality of your communications.

That member will not identify the caller, nor the person about whom the caller has concerns, to any other committee member, the Bar Association, or anyone else.
In fact, you need not even identify yourself when you call.

Contact any member of the Lawyer's Assistance Committee for confidential, one-on-one help with any substance use or abuse problem.

**Heather L. Gardner**
(Anchorage) 375-8776

**Michelle Hall**
(Barrow) 852-2521

**Sonja D. Kerr**
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**John McConnaughy III** (Anchorage)
343-6445 (private line)

**Michael S. McLaughlin**
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HI-TECH IN THE LAW OFFICE

# Digital cameras for the law office — A test of photo quality

*By Joe Kashi*

I recently needed to purchase a new, higher resolution compact digital camera

Having been disappointed by the image quality of some earlier purchases made solely on the basis of published reviews, I made my own tests this time, personally printing and comparing identical 20" x 24" prints made by both well-established models and some of the newest mid-range cameras available from major vendors with a reputation for consistent quality.

I made very large prints to determine overall image quality because photographic prints are usually the ultimate result of most photographic efforts and small prints are not a good indicator of what will or will not look good in front of a jury. Almost any digital camera's images can look good on a computer screen or on 4"x 6" snapshot paper but often fail abysmally when enlarged beyond letter size paper.

Not trusting my own observations as a sole guide, I conducted a thoroughly non-random and unscientific survey of 12 other people, including co-workers, my spouse Terese Kashi and my 12-year old step-daughter Rachel Lee Amos. Opinions were generally quite consistent.

What surprised me were the consensus opinions. The bulkiest and most expensive, complicated digital SLR cameras generally did not produce the sharpest nor most pleasing results. I'll tell you why below.

Readers may recall some earlier articles in which I discussed basic digital photography concepts and how to authenticate digital photographs for evidentiary purposes. These remain posted on the American Bar Association Law Practice Management Section's web site and you can find them at the URL addresses listed in the footnote. The general concepts set forth in those articles remain quite current and the reader is referred to them for a detailed discussion of fundamental digital photography concepts and techniques[1] that we need not repeat them here. Instead, this article cuts to the chase and evaluates some cost-effective high grade digital cameras that you might find useful as a litigator.

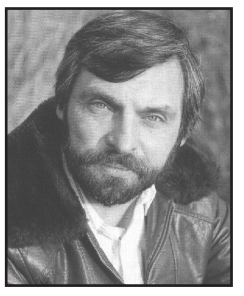
**Testing Method:** I downloaded identical high sharpness photographs of a brick church from the camera test archives of www.dcresource.com, one of the most highly regarded digital camera review web sites[2] and printed each of the digital files without any post-processing[3] and exactly as posted as 20" x 24" color prints, using an HP DesignJet 130 six-color printer.

I decided to base my comparison upon very large full color prints for several reasons: As litigators, we need large prints to introduce into evidence for the trier of fact's consideration even if we also digitally project photos on to a screen during trial. You will need large photographs for the jury to take into the jury room during deliberations. If you plan to do fine art photography, your end result is necessarily a high quality print. Finally, when you print out an image using modern printer software, the software often corrects camera noise (digital graininess) and other image problems, thus minimizing the impact of noisy sensors as a purchasing consideration.

I used 20"x 24" both as a matter of convenience and also because it is the minimum size that I would considerable acceptable as a jury exhibit when viewed at a distance from the jury box. Realistically, 24" x 36" or larger prints would be better when viewed at a distance but would be awkward to handle in the jury room or by the Court in chambers.

**The bulkiest and most expensive, complicated digital SLR cameras generally did not produce the sharpest**

Both the Digital Camera Resource and Imaging-Resource websites provide a gallery of identical photos taken by each reviewed camera and allow you to download the full-sized file of each comparison negative so that you can print it and examine it at your leisure. Imaging-Resource goes one step further, allowing side-by-side comparison of identical sample photos made by two different cameras.



**Having been disappointed by the image quality of some earlier purchases made solely on the basis of published reviews, I made my own tests this time**

If you use this comparison feature, then be sure to download the full-sized file and compare the enlarged images. Short of making a lot of identical 20" x 24" prints, this is probably the best way to evaluate the default image quality of any digital camera.

## Desirable Features:

**1. The sharpest possible lens, first and foremost.** Coupling a high quality sensor with a mediocre lens is a total waste. Be aware that high zoom ratio lenses ( 6X zoom or greater) tend to be inherently less sharp because it's very costly and difficult to optimize optical performance over such a wide magnification range. Zoom lenses using manually turned zoom rings are preferable to electrically operated zoom lenses for a number of reasons including longer battery life, faster start-up, and more precise framing.

**2. A low-noise sensor** that can record at higher ISO sensitivities without objectionable noise. All things being equal, it's nice but not crucial to be able to shoot without a flash under low light situations. SLR cameras such as the Nikon D80 and Canon Rebel EOS400 use larger sensors that usually work much better under low light conditions. All other matters being equal, a large format sensor is usually better in low light situations.

**3. Decent and balanced resolution.** The sheer number of megapixels is a relatively meaningless measure of ultimate quality - very high megapixel counts are often driven more by marketing than by engineering. Beware of any 20-year-old camera salesman who tells you that one camera is inherently better because its sensor contains more megapixels. Given the small 1/1.8" or smaller sensors found in almost all non-professional cameras, cramming more megapixels into the same area often results in objectionable noise levels that can negate any marginal resolution increase. A good six megapixel (6 MP) sensor coupled with a very good lens can produce gallery quality photos that are adequately sharp when enlarged to 20" x 24", even under close examination. Conversely, some 9 MP and 10 MP cameras exhibit lower sharpness either due to poor quality lenses or noisy sensors. A good 8 MP sensor and very high grade lens is often an excellent compromise.

**4. Excellent automatic color balance with manual color balance options.**

**5. RAW file format and low compression "superfine" JPEG recording options.**

A. Regular JPEG files are heavily compressed to reduce file sizes, something that I find rather archaic now that you can buy a 200 gigabyte hard disk for $100 or so. File compression is the enemy of photographic quality, resulting in lower resolution, blown out highlights without any detail, and reduced color fidelity. RAW file formats will usually produce optimum photo quality.

B. Totally uncompressed RAW file formats that record the total data sensor data are optimum both photographically and also as a means of later authenticating digital images for evidentiary purposes. RAW format files not only potentially produce the sharpest possible images after later processing with your computer but, compared to JPEG files, can also be more completely corrected for many photographic parameters including proper color balance, noise reduction, contrast control, highlight detail, etc.

C. No entry level consumer cameras and relatively few mid-range digital cameras include the ability to save files in a RAW format. Adobe Photoshop CS2, a high end professional photo editing suite, or Photoshop Elements 5, a more than adequate "lite" version of Photoshop CS2, are an excellent way to open, correct and work with RAW format files from almost all generally available cameras with a RAW file option.

**6. A live "histogram"**, a type of display that shows the distribution of bright and dark areas and that can help you optimize your exposure. Properly used, a live histogram is one of the best ways to optimally adjust exposure to a particular situation.

**7. Both an optical viewfinder and large, bright LCD display.** Look for cameras that include an optical viewfinder in addition to the LCD display on back. An optical viewfinder is often handier when you need to shoot quickly or under low light conditions. A lot of people who first learned using 35 mm film cameras will find an optical viewfinder more natural and comfortable. Look for one with diopter correction to compensate for your own eyesight.

**8. Easy exposure bracketing,** a setting that causes the camera to take three or more shots at different exposures and in rapid succession. This in handy when you are not sure about the correct exposure because of unusual or difficult lighting conditions that may fool a camera's automatic exposure. Professional photographers traditionally shot a lot of film to be sure that they had at least one good exposure. It's a lot less expensive and a lot easier to take this precaution with a digital camera.

**9. Both reliable automatic operation and also easily operated manual over-ride exposure options.** You really need programmable compensation (P) and manual exposure (M) modes as your abilities progress, particularly if you run into situations that can fool purely automatic exposure modes.

**10. A decent quality VGA movie mode** - often, we only need a few short clips for evidentiary purposes and a digital camera is often the most convenient and useful way to get these.

**11. Proper zoom range** - If you're going to do a lot of indoor or real estate photographs, then you'll need a camera what includes very wide angle capability, basically the 35 mm film camera equivalent of a 24mm to 28mm wide angle lens. If you're planning to use a camera for surveillance, then you'll need a camera whose zoom range includes very high magnification at the telephoto end, on the order of a 400 mm equivalent lens. "Digital zoom" is a scam - turn it off to avoid degraded images.

*Continued on page 9*

# Digital cameras for the law office

*Continued from page 8*

**12. Adequate "scene" modes"** - some lighting conditions, such as bright sun on snow or theater lighting are inherently tricky. Good scene modes will automatically set your camera to whatever the manufacturer has found to be optimum under that specific circumstances. These are very helpful for amateurs and handy for experienced photographers as well.

**13. External flash capability** - either the traditional "X synch" output or a hot shoe for a programmable flash designed for that particular camera. Built-in flash is usually really anemic and can't reliably reach beyond about 10 feet or so. Sooner or later, you will want a more powerful and sophisticated external flash unit, so you'll need a camera that can work with an external electronic flash.

**14. Fast startup and operation** are nice but probably not crucial under most legal evidentiary circumstances. If you really need to be able to shoot photos really quickly, then you probably need to hire a professional anyway. Given the choice between better photo quality and faster operation, go for better quality every time unless you plan to shoot NBA basketball. Consumer grade and mid-range digital cameras typically exhibit relatively slow operation compared to digital SLR cameras.

**Given the choice between better photo quality and faster operation, go for better quality every time unless you plan to shoot NBA basketball.**

**15. Anti-shake stabilization** - very nice in low light. Unfortunately, most mid-range cameras are only now acquiring optical anti-shake technology. "Digital anti-shake" or its verbal equivalent is also a scam - it just raises the sensor sensitivity and uses a faster shutter speed, leaving you with very noisy, potentially unusable images. In contrast, true mechanical anti-shake technology moves the sensor or a lens element to truly compensate for the kind of slow shutter speed camera shake that is the leading cause of blurred images.

**16. Low light capability:** Generally speaking, digital SLR cameras tend to excel primarily in low light capabilities and speed of operation. Digital SLR cameras with only their basic "kit lens" are often no sharper than some of the better mid-range cameras that include a RAW file format option.

**17. Easily transportable size.** All other things being equal, it's easier to take a compact camera with you wherever you go and thus a compact camera is more likely to be used. On the other hand, compact cameras have to strike a balance between convenient small size and overall image quality. If forced to make a decision, opt for better image quality rather than style and compact size.

## Cameras that I Evaluated:

Firstly, all of the cameras listed here produced at least acceptable 20" x 24" color prints although some models produced demonstrably better images. Except for one older model included for comparative purposes, all of the models listed remained in production as of January 20, 2007, after the conclusion of the Winter 2007 Consumer Electronics Show.

All lens zoom ranges are quoted in 35 mm film camera equivalent focal length. All mentioned cameras include a decent LCD screen on the camera but some omit optical viewfinders. All cameras include built-in electronic flash, fully automatic capabilities, and at least some more common scene modes. All mentioned cameras also include adequate or better construction quality except as noted and an adequate movie mode except the Nikon D80 and Canon Rebel Xti digital SLR cameras and the Sony DSC-R1, a large SLR-like camera. Adobe Photoshop CS2 and Adobe Photoshop Elements 5 directly support the RAW format files of each camera mentioned here as including RAW capability. Price in parentheses is the approximate "street price", not list price.

1. **Panasonic DMC-LX2**, 10.2MP 16:9 wide screen sensor with Leica branded 28-112 mm lens. This is a compact camera that includes RAW format option, anti-shake technology, full manual controls, and histogram but no optical viewfinder. (Introduced late 2006). ($400)

2. **Canon A640**, a moderately compact 10.0 MP with Canon 35-140mm lens. Includes an optical viewfinder and very nice LCD that can be positioned at almost any angle but no RAW format, no live histogram, no anti-shake and somewhat inconvenient manual controls. (Introduced Autumn 2006). Optical quality is generally excellent but it appears that Canon has deleted some previously included features to avoid competing with more expensive offerings whose basic optical quality is no better. (First available Autumn 2006) ($350-$400)

3. **Kodak P880**, an 8.0 MP mid-sized SLR-like camera with a Schneider-Kreuznach 24-140mm lens, RAW file format, excellent manual control, hot shoe for dedicated external electronic flash, exposure bracketing even with RAW format images, but no anti-shake technology. (Introduced November 2005) ($280 to $399 when ordered directly from Kodak)

4. **Sony DSC-R1**, 10.3 MP large format APS-C sensor with Carl Zeiss 24-120mm lens, RAW file format and an LCD screen that can be positioned at various angles, but no anti-shake technology. This is a very large camera. $900. ( First available January 2006)

5. **Canon Rebel XTi (EOS400) SLR** 10.1 MP large format sensor with the Canon 18-55 mm ( 35mm equivalent would be 28mm to 88 mm) "kit" lens included with the basic. Optional lenses are usually sharper a basic kit zoom lens sold with the camera body but cost several hundred dollars each. The Rebel XTi is small for an SLR camera but still relatively large compared to compact and moderately compact cameras. Includes RAW file format, optical viewfinder and anti-shake technology. (Introduced late summer 2006) ($775 with basic kit lens)

6. **Nikon D80 SLR** 10.2 MP large format sensor with Nikon 18mm to 135 mm kit lens (35 mm equivalent would be 27mm to 200 mm). Again, optional "prime" lenses are usually sharper than a "kit lens" included with the basic camera body purchase but greatly increase your cost. Includes RAW file format, optical viewfinder and anti-shake technology. (Introduced late summer 2006). This is a large camera.. ($1,220)

**all of the cameras listed here produced at least acceptable 20" x 24" color prints although some models produced demonstrably better images.**

7. **Kodak P712**, a 7.4 MP cousin that's very similar to the Kodak P880 but with a different sensor and lens, in this instance a Schneider-Kreuznach 36-432 mm equivalent high magnification telephoto zoom lens. (Introduced late summer 2006) Includes a hot shoe for a dedicated external electronic flash, RAW file format options and true anti-shake capability. This camera shares the same body design as the Kodak P880 but uses an electrically operated zoom lens rather than a manual zooming ring. This is a mid-sized SLR-like camera. ($380)

8. **Fujifilm E900**, a 9.0 MP moderately compact camera with a Fujifilm sensor that's less noisy under low light conditions and a 32mm -128mm Fuji 4X zoom lens.. The E900 is a basic compact camera that includes an optical viewfinder and RAW file format capability and manual control capability but no anti-shake technology. (First available December 2005) ($290)

9. **Fujifilm F30**, a 6.3MP compact camera with a reputation as the best compact camera to use in low lighting situations. The F30 includes a Fuji 3X zoom lens with a 36-108 mm equivalent coverage. It does not have an optical viewfinder, RAW format capability or true anti-shake technology. ($260)

10 **Kodak z7630**, a 6.1 MP moderately compact camera with a Schneider-Kreuznach 39-117 mm equivalent lens. It is included here as a comparison because it was considered one of the best affordable cameras a mere two to three years ago. (Available late summer 2004). (No longer made, last available as z760 for $165)

11. **Olympus SP-350**, an 8.0MP compact camera with a that surprisingly included a RAW file format, full manual control, a hot shoe for an external electronic flash, and an optical viewfinder. It does not have true optical anti-shake technology. (Introduced late 2005) ($290)

12 **Kodak c875** 8.0 MP with Schneider-Kreuznach 37-185 mm equivalent lens, included here because it has received unusually good reviews for an inexpensive consumer camera. (Introduced late summer 2006). It has full manual controls but no optical viewfinder, does not support RAW file format, and does not support true optical anti-shake technology. ($169)

## TEST RESULTS:

1. All of the listed cameras could produce a decent quality 20" x 24" color photographic print.

2. Only one person out of 12 considered a print from a digital SLR, in this case the Nikon D80, to be the sharpest.

3. There was a clear but not overwhelming consensus that the prints from the Kodak P880, Panasonic DMC-LX2, and, to a lesser extent the Canon A640, were the sharpest of the 12 different cameras.

4. There was a strong consensus that the Kodak P880 print had the best overall appearance. I included two copies of the same Kodak P880 image in the tests without telling people. This occurred initially because of an accidental double printing of the Kodak P880 image but I decided to leave the second copy in as a "ringer" to see how it would affect the observers's conclusions. Interestingly, there were a few cases where people unknowingly chose both of the identical P880 prints as the two best but where then unable to make a further choice between them.

5. Perceptions of sharpness were affected by contrast and good color balance. Prints with more contrast and with better color balance were perceived as sharper even though they were not upon minute inspection.

6. Sensor noise was not a problem, even in the clear sky details, on any of the prints. This was undoubtedly due to noise correction software built into the HP DesignJet130 printer driver.

*Continued on page 10*

# Digital cameras for the law office

*Continued from page 9*

Several of the evaluated cameras, particularly the Panasonic LX2 had a reputation for very noisy sensors but that was not apparent here. Other printers, such as the Canon i9900, were also effective at suppressing image noise in the final print but not to the same degree as the HP DesignJet 130.

7. The best way to reduce or eliminate evident sensor noise in compact and mid-range cameras is to shoot at the lowest feasible sensitivity, to ensure ample exposure, and to use a tripod or monopod to reduce camera shake if you need to use a slow shutter speed.

**Overall, I thought that the Kodak P880 was the best overall camera for a law office and suited for both a raw amateur and an advanced photographer.**

8. Optical quality seemed to have the greatest overall impact on the final image. Some cameras had visible softness or uncorrected chromatic aberrations where all colors do not come to a single focus. The Fujifilm F30 and E900 showed a particularly large amount of chromatic aberration but the Nikon D80 also, to my surprise, showed some as well.

9. Details of photos taken with the 6 MP cameras were slightly softer than cameras with higher resolution sensors. However, if a very good lens is used, as with the Kodak z7630, a 6 MP camera can take excellent photographs that can be enlarged to 20" x 24" so longer as you do not inspect the images with a magnifying glass. Overall compact camera image quality did not seem to be substantially affected by whether the sensor contained 6MP, 8MP or 10MP. 8 MP is probably adequate for most purposes assuming a very good lens.

**The Fuji F30 is an excellent pocket camera and is used by many professional photographers as their traveling camera.**

10. The Olympus SP-350 should have been a nearly perfect pocket camera. for the advanced amateur. However, the SP-350 showed a little too much softness in fine details and too warm overall for my taste. Images taken with a 6 MP Kodak seemed sharper overall.

11. The Sony DSC-R1 images were very sharp and had a very pleasing color balance. However, they did not appear as sharp to most observers, most likely because the default Sony R1 images were somewhat lower contrast. That is not necessarily a bad thing because low contrast can always be corrected more completely and more easily than too-high contrast that results in the loss of highlight or shadow detail.

12. The Canon A640, Kodak P880, Sony R1 and Nikon D80 had the nicest overall color balance. However, the Nikon D80 did show some strange chromatic aberrations in unexpected areas but these may be a problem with the specific shot or camera.

13. The Kodak C875 was very sharp for a low price consumer grade camera and made a good print. However, the color was too saturated on the default setting and reducing saturation in the camera's setup menu would be advisable.

14. The Panasonic LX2 was probably the sharpest image but its color balance was too bluish for my taste. However, that sort of color balance problem can be rectified in seconds if you are shooting your images in the camera's RAW format and adjust the color temperature using the Adobe Camera Raw plug-in for Photoshop CS2 or Photoshop Elements 5. Overall, I thought that the LX2 was the best compact camera, assuming that you are shooting in broad daylight using a RAW file format and don't need quick shot to shot performance.

15. Overall, I thought that the Kodak P880 was the best overall camera for a law office and suited for both a raw amateur and an advanced photographer. I also thought that it was the most cost-effective camera in the group that I tested.

16. Closely following theP880 in overall quality and cost-effectiveness are the Panasonic LX2 and the Canon A640. In head-on tests, I did find that the P880 was somewhat sharper than the A640, even without using the P880's uncompressed RAW file format.

17. The Fuji F30 is an excellent pocket camera and is used by many professional photographers as their traveling camera. I found its images a little softer but still quite acceptable. Taking into account the F30's good low light capabilities, I believe that it might be an excellent casual and travel camera.

18. I had high hopes for the Fuji E900 as a decent compact camera with RAW capability but I was rather disappointed by its optical quality. The lens exhibited noticeable distortion at the not-very-wide widest setting, and very noticeable chromatic aberration throughout the image

19. The Kodak P712 was a sharp and full-featured camera with a very high magnification zoom lens. It would make an excellent camera for surveillance purposes, wildlife photography or other uses that require a powerful telephoto capability. Other cameras in its class include the Canon S3 IS and the Sony DSC-H5 but neither of these latter cameras includes RAW capability or a hot shoe for a dedicated electronic flash. My choice for a long lens camera is the P712.

20. The Canon Rebel X T I produced pleasing images with nice color balance but its relatively high price and somewhat soft basic kit lens render it not very cost-effective compared to some of the other comparable cameras here unless you need fast shot to shot performance or the ability to shoot in low light conditions. No one picked the Canon Rebel as either being either sharpest or presenting the most pleasing overall image. I considered its quality to be pretty decent personally.

21. The 2004 Kodak z7630 (which mutated in 2005 into the z760) was actually quite sharp for an older 6 MP camera. I thought that its images stood up quite well to newer designs using higher resolution sensors.

## RECOMMENDATIONS:

1. **Kodak P880** as an all-around, relatively inexpensive and easy to use camera with professional capabilities

2. **Canon A640** as s high resolution point and shoot camera if you don't need RAW file format and external electronic flash capabilities

3. **Panasonic LX2** as an excellent compact camera with top end sharpness

4. **Kodak P712** for long telephoto surveillance purposes including long range video

5. **Fuji F30** as a lightweight travel and low light camera.

6. Expensive digital SLR cameras are probably too bulky and expensive for average law office use. Also, digital SLR cameras can provide fast, easy digital video.

**Footnotes**

[1] Basic Digital Photography Made Easy, or at least a little less obscure, Part 1, March 2006 Law Practice Today, by Joe Kashi http://www.abanet.org/lpm/lpt/articles/tch03064.shtml; Basic Digital Photography Made Easy, Part 2, April 2006 LPT by Joe Kashi, http://www.abanet.org/lpm/lpt/articles/tch04061.shtml ; and Authenticating Digital Photographs by Joe Kashi http://www.abanet.org/lpm/lpt/articles/tch06061.shtml

[2] Other very highly regarded digital camera review and evaluation sites include www.imaging-resource.com ; www.steves-digicams.com ; www.megapixel.net (Canada) and www.dpreview.com (UK)

[3] I did not use post-exposure computer software to enhance sharpeness, noise reduction, or color balance.

## THE SEARCH FOR INNOVATION CONTINUES

The College of Law Practice Management has called for nominations for the 2007 InnovAction Awards, which it has developed as "a worldwide search for lawyers, law firms and other deliverers of legal services who have invented and successfully applied totally new business practices to the delivery of legal services."

The goal of the awards is to demonstrate to the legal community what can be created when passionate professionals, with big ideas and strong convictions, are determined to make a difference, says the college

"We intend to seek out and recognize creativity and genuinely new ways of thinking in law practices wherever they may be," said College President Merrilyn Astin Tarlton. "While traditionally the practice of law has been firmly rooted in precedent, with lawyers and law firm managers reluctant to accept change, we know a good deal of innovative thinking is now at work around the world to solve the business challenges faced by law firms in today's competitive market. We want to focus the legal profession on these extraordinary achievements."

The award recipients will be selected by a blue-ribbon panel of judges in July 2007, and actual presentation of the awards will occur in September at the college's annual meeting in Philadelphia, PA. Award entries will be judged on the basis of four primary criteria:

- Absence of precedent (never been done or done quite this way before.)
- Evidence of action (the innovative idea was transformed into action and not merely reflective of best intentions)
- Effectiveness of innovation (there is some measurable outcome that would indicate that the innovation is accomplishing what it was intended to do)
- Action must have taken place within no more than three years prior to this entry.

"We realize that there are many management challenges faced by the legal profession, and too often we hear lawyers saying things like 'We've never done it that way!' or 'Who else has done this?'" said Chuck Coulter, chair of the InnovAction Awards and past president of the college. "We want to recognize and honor those who dare to think differently and succeed by doing so."

In the first two years of the InnovAction Award program, award winners were from Glasgow, Scotland; Birmingham, England; Auckland, New Zealand; Philadelphia, Des Moines, and Chicago.

The 2007 InnovAction Awards are sponsored by Australian Lawyers Weekly, Greenfield/Belser Ltd., Inside Counsel, Law.com, LexisNexis, ABA Law Practice Management Section, The Canadian Bar Association, International Legal Technology Association (ILTA), Office Tiger, an RR Donnelley Company, Altman Weil, Inc., Compuware, Kraft & Kennedy, Inc., Interwoven, Inc., Project Leadership Associates, and Redwood Analytics.

Any lawyer, law firm, or entity providing legal services to clients anywhere in the world is eligible. Further information about the awards, eligibility restrictions, and nomination forms are available at www.innovactionaward.com.

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# China's trademark laws -- simple and effective

*By Daniel P. Harris*

Members of the media love to write about China's failure to protect foreign company intellectual property (IP), but those articles can be misleading. These articles often fail to state whether the foreign company actually registered its IP in China at all and they nearly always fail to distinguish between the various types of IP eligible for protection. Both of these shortcomings are meaningful.

China generally does not protect any IP unless it is registered in China. Though there are a few exceptions to this rule, the bottom line is that it will always be cheaper for a company to register its IP than to litigate, whether it comes within any exception or not.

The failure to distinguish among the various types of intellectual property leads companies to believe that enforcement of intellectual property in China is poor across the board, and that simply is not true. China's patent law system is difficult and spotty, at best. Copyright protection in China--particularly of DVDs, CDs, and software--is downright terrible. But, its protection of trademarks is actually quite good and getting better all the time. China's better courts (usually found in China's more commercialized cities) are actually quite good in enforcing trademark rights. There is a widely believed theory that countries start enforcing IP rights when their more powerful domestic companies demand enforcement because they themselves have IP worthy of protection.

With respect to trademarks in China, that time has already arrived. As proof of this, I often talk about an incident in China involving watermelon and rumors of their having been tainted by AIDS. A group of watermelon farmers in Linquan county, (a county in Shandong Province known for the high quality of its watermelons) had registered a trademark for their watermelons and established an association to promote them. The Linquan watermelons had, according to the Shanghai Daily, became "the top sellers, even though their price was much higher than watermelons from other regions."

Sales of Linquan watermelons then plunged amid rumors they had been injected with HIV tainted blood. The rumors had a devastating impact on sales. The newspaper interviewed one of the farmers who said he planted more than 6.7 hectares of watermelon this year. Before the rumors, he had sold out all of the watermelons harvested. After the rumors, much of the inventory rotted.

It should be clear from this incident that securing a trademark in China can be an effective tool for distinguishing your product from the competition and for allowing you to charge a premium price for it. That is exactly what happened here. The efficacy of trademarks in China allowed the Linquan farmers to charge significantly more than others and yet sell out of their watermelon crop, and it also caused its rivals to feel they needed to spread the vicious AIDS rumor.

So now that I have (I hope) convinced you that it makes sense to protect a trademark in China, the next step is to explain how to do so. Easy. Register it. Plain and simple.

China is a first-to-register country, which means that unless your trademark is a well known mark (and let me assure you it almost certainly is not and you definitely do not want to be litigating this issue in any event), whoever registers it in China first gets it. Put another way, to expect trademark protection in China, foreign companies must register their trademarks in China and the prudent company does this before going in.

There are actually a number of people in China who make a living by usurping foreign trademarks and then selling a license to that trademark to the original license holder. Once one comes to grip with the fact that China, like most of the rest of the world, is a "first to file" country, one can understand how easy this usurpation is, and also, how easy it is to prevent it.

The fact that you are manufacturing your product in China just for export does not in any way minimize the need for you to protect your trademark. Once someone registers "your" trademark in China, they have the power to stop your goods at the border and prevent them from leaving China.

China's trademark requirements are actually quite similar to those in most other countries. The trademark must not conflict with an existing Chinese trademark and it must be distinctive. China allows for registration of all marks for goods, services, collective marks and certification marks.

In deciding what to trademark, foreign companies must consider all sorts of things. Take Starbucks, for instance. Starbucks registered more than 200 trademarks in China. It has registered Starbucks in English and the translation of "star" and "bucks" together in Chinese. Any foreign company strategizing about what to trademark in China must have a fluent Mandarin speaker to assist. Indeed, some of the very largest foreign companies register trademarks in other dialects used in China as well.

China's Trademark Office maintains a centralized database of all registered and applied-for trademarks. Trademark applications that pass a preliminary screening are published by the Trademark Office and subject to a three-month period for objection. If there are no objections within this three-month period, or if the Chinese Trademark Office rejects the objections as frivolous, the trademark is registered. If the Chinese Trademark Office supports an objection, it will deny the application. Denied applications may be appealed to the State Administration of Industry and Commerce Trademark Review & Approval Board and then to the People's Court. Based on our experience, objections to trademarks are rare.

A Chinese trademark gives foreign companies a surprising amount of protection in China. If a foreign company learns that its trademark is being infringed in China, it has a number of actions available to it.

We usually advise our clients to pursue a multi-pronged approach to protect an infringed-upon trademark and to pursue the infringer. The foreign trademark owner should usually file a lawsuit against the infringer, seeking damages and an injunction stopping the infringer from continuing to sell the infringing goods. The Chinese courts in the more commercialized regions are actually quite willing to enforce China's trademark laws, even for foreign companies.

Trademark infringement is a crime in China. For serious cases of infringement, a complaint to the office of the public prosecutor can often result in a criminal prosecution against the infringer. The Chinese police will close the offending operation and seize the counterfeit goods. The courts are authorized to impose both fines and imprisonment. Finally, if the counterfeit goods are destined for export, a notice to the Chinese customs authorities will prevent export of the counterfeit goods.

## 4 new judges installed in Supreme Court Chambers

**Jack W. Smith, Superior Court Judge**
February 20, 2007 at 3:30 p.m.
Anchorage, Alaska

**Michael R. Spaan, Superior Court Judge**
March 2, 2007 at 3:30 p.m.
Anchorage, Alaska

**Kari C. Kristiansen, Superior Court Judge**
March 8, 2007 at 3:00 p.m.
Palmer, Alaska

**Vanessa H. White, Superior Court Judge**
March 8, 2007 at 3:00 p.m.
Palmer, Alaska

# Chugiak High School Wins 2007 Mock Trial Competition!

On February 16-17, nine high school teams from throughout Alaska participated in the 2007 High School Mock Trial Competition. The Boney Courthouse in Anchorage was host to seventy students and nearly 50 volunteers who assisted students in the competition that required four preliminary rounds of simulated trials, where each team presented its case twice as the plaintiff and twice as the defendant. Special thanks go to Justice Bryner and Judges Mannheimer, Morse, Rindner, and White for judging the finals of the competition.

In the closely contested final round, Chugiak High School emerged victorious on four of the five judge's score sheets to be crowned the 2007 champion. Coached by teacher Henry Vancik and attorney Jonathan Hegna of Farley Graves, Alaska's champs will next travel to Dallas, Texas in May to sweep the 2007 National High School Mock Trial Championship.

Student teams and their coaches spend months training for this event which celebrated its 18th year of sponsorship and organizations by the Anchorage Bar Association's Young Lawyer Section. Teams were responsible for the roles of both attorneys and witnesses. Just like in a real trial, the witnesses faced stringent cross-examination and the attorneys were forced to respond to vigorous objections. Students learn first-hand the value of learning how to analyze and respond quickly; in fact, many of the judges commented on how impressed they were with the public speaking and critical reasoning abilities of the students

The trial centered on an employee of a daycare center in the fictional town of Bearclaw, Alaska who was demoted and then fired after having an epileptic seizure while at work. Students presented testimony and evidence regarding whether the demotion was a reasonable accommodation for the employee's medical condition and whether an arguably inflammatory letter was sufficient justification for the employee's eventual firing.

The Mock Trial Competition is made possible by generous grants from the Law Related Education Committee of the Alaska Bar Association, the Alaska Humanities Forum, the Anchorage Bar Association, and the Dorsey & Whitney Foundation. This year's funds will be provided to Chugiak High School to help defray travel expenses to the national competition in May.

The Mock Trial Committee is honored to offer this opportunity for high school students to learn about law and the judicial system in a fun and engaging setting. If you are interested in learning about how to organize a Mock Trial team at your local high school, please contact Ryan Fortson at fortson.ryan@dorsey.com.

**Chugiak team: The winning Chugiak High School mock trial team poses with Judge David Mannheimer of the Alaska Court of Appeals.**

**West: The West Anchorage High School team prepares its case.**

**Objection: Chris Nichol of Skyview High School objects to a line of questioning by Steller Secondary School.**

**Sitka: Amy Parrent of Sitka High School ardently presents her argument.**

***Photos by Ryan Fortson***

*LRE for the layman:*

# Lawyer's book explores Court's effect on the little guy

"The Supremes' Greatest Hits," an account of how the U.S. Supreme Court's decisions affect the lives of every American, has been published by Sterling Publishing. Written by Michael G. Trachtman, a Pennsylvania attorney, the book traces important Court decisions in layman's terms.

"While many books have focused on the Court's history and selected landmark decisions, this is the first that explains how the Court affects the everyday lives of all Americans, and it does it in a way that people can enjoy, appreciate and understand," says Trachtman.

"The Supreme Court is an enigmatic institution to most; it is difficult for non-lawyers to understand how it operates and why it is so important."

"The Supremes Greatest Hits" describes how the Court has interpreted the Constitution and, in the process, how the Court has defined our way of life. Appropriately, it begins with Marbury v Madison, where the Court, in a masterstroke of legal analysis combined with political savvy, affirmed the judicial branch's the power to overturn decisions made by the executive and legislative branches.

Aside from well-known, hot-button issues like abortion, the Supreme Court has, for instance, established the rules for religion in public schools; the rights of employees to sue for harassment; exchanging music over the Internet; when the government can take your home or backyard; the parameters of free speech; the rights of those accused of crimes; and how far the government can intrude into our private lives.

The Supreme Court is also responsible for defining how government operates and affects American citizens.

The Supreme Court gave the federal government the power to eliminate segregation. It established that even a president is not above the law, as when it required former President Nixon to comply with court orders and release documents relating to the Watergate scandal. It wrote the ground rules for how we elect candidates. And it determined whether George W Bush or Al Gore would be the president.

Bach year, the U.S. Supreme Court considers some 7,000 cases. In the majority of cases, the rulings of lower courts will not be disturbed, but each year the Court will select approximately 50-100 cases with national importance or constitutional significance, and through those cases, it continues to write the American rulebook.

"The Supreme Court is in many ways the most powerful branch of our government, and yet it's the least understood," says Trachtman. "Our democracy depends on our citizens being informed about how our government really works. Only then can our country become what the majority of citizens want it to be not only for themselves, but also for their children."

Among the crucial matters the Court will face in corning years will be negotiating the difficult balance between individual rights and crucial freedoms on the one hand, and the need for security in a post-9/11 world, on the other. Also of importance will be the potential regulation of the Internet, the extent to which the federal government can regulate local businesses, the extent to which religion will be permitted to intermix with government, the permitted scope of affirmative action and diversity initiatives, and the potential redefinition of patent law.

The 172-page paperback has been published by Sterling Publishing Company, Inc of New York. $9.95.

## NOTICE TO THE PUBLIC

By order of the Alaska Supreme Court,
entered February 14, 2007

**RONALD W. LORENSEN**
Member No. 7410088
Juneau, Alaska

is transferred to disability inactive status
due to a physical disability
effective February 14, 2007

Published by the Alaska Bar Association,
P. O. Box 100279, Anchorage, Alaska 99510-0279
Pursuant to the Alaska Bar Rules.

NEWS FROM THE BAR

# Board of Governors Action Items January 25 & 26, 2007

• Voted to get a final cost proposal from Casemaker, and talk to members in other Bars that belong to Casemaker.

• Voted to recommend the admission of six reciprocity applicants.

• Voted to approve one request for special accommodations and one request for additional accommodations for the February 2007 bar exam.

• Voted to contribute $5,000 to the Oral Language Interpreter Center.

• Voted to recommend to the supreme court that Jon Wiederholt's request for reinstatement be denied.

• Voted to recommend to the supreme court that Larry Wiggins be suspended for 180 days, with 90 to serve; proof of restitution required; to require certain CLE courses; and to assess $2500 in costs and fees.

• Adopted a resolution affirming the Law Related Education Committee's allocation of grants; grants will be published in E-News and the Bar Rag.

• Adopted a resolution affirming leadership goals for Board members doing or supporting Pro Bono work.

• Approved the minutes of the October 27, 2006 Board meeting.

• Voted to publish a proposed amendment to Bar Rule 63 regarding the unauthorized practice of law (UPL).

• Voted to give staff direction for drafting proposed amendments to Bar Rule 44 (Legal Intern Permit).

• Voted to recommend to the supreme court a proposed amendment to Bar Rule 15.1 requiring Bar members to maintain their trust accounts in institutions that agree to provide notice of trust account overdrafts.

• Voted to send to the supreme court a proposed amendment (a housekeeping change) to Bar Rule 61(a) regarding the administrative suspension of a bar member.

• Voted to send to the supreme court proposed amendments to Bar Rules 13, 38 and 40 regarding changes to the Fee Arbitration rules as recommended by the Fee Arbitration Executive Committee.

• Voted to table amendments to Bar Rules 17, 10, 11 & 12 regarding immunity and requested Bar Counsel to get more information on procedures from other states.

• Agreed to establish an ad hoc subcommittee of Board members to look into short and long range goals aimed at increasing the number of Alaska Native lawyers in the Bar Association.

## Practice of law/rules proposed

The Board of Governors invites member comments concerning the following proposal amending the Alaska Bar Rules. Additions have underscores while deletions have strikethroughs.

**Alaska Bar Rule 63:** The Board appointed a subcommittee to consider proposed Bar Rule 33.3 that would define the practice of law for the injunctive purposes of AS 08.08.210. The subcommittee reported back to the Board and proposed that instead of going forward with Bar Rule 33.3, the Board consider an amendment and addition to Bar Rule 63.

This proposal creates a new subparagraph (b) which requires a nonlawyer preparing or completing a document which affects legal rights or duties to obtain a signed statement from the recipient that states that the recipient understands that the preparer is not a lawyer, that the document may not be legally enforceable, that the document should be reviewed by a lawyer authorized to practice law in Alaska, and that the recipient may contact the Bar Association to report any problems the recipient experiences with the document. The proposal also specifies the font size, document size, document color, and languages to be used and requires the preparer to maintain a copy of the statement signed by the recipient for five years.

**Rule 63. Unauthorized Practice of Law – AS 08.08.230.**

For purposes of AS 08.08.230 (making unauthorized practice of law a misdemeanor), "practice of law" is defined as:

(a) representing oneself by words or conduct to be an attorney, and, if the person is authorized to practice law in another jurisdiction but is not a member of the Alaska Bar Association, representing oneself to be a member of the Alaska Bar Association; and (~~b~~) either (i) representing another before a court or governmental body which is operating in its adjudicative capacity, including the submission of pleadings, or (ii), for compensation, providing advice ~~or preparing documents for another~~ which affects legal rights or duties~~.~~ or

(b) for compensation, preparing or completing a document for another which affects legal rights or duties unless the person preparing or completing the document obtains a signed statement from the person receiving the document that contains the following warning:

"I, (INSERT NAME), understand that (INSERT PREPARER'S NAME) is not a lawyer, that this document may not be legally enforceable, and that I should have this document reviewed by a lawyer authorized to practice law in Alaska. I may contact the Alaska Bar Association, PO Box 100279, Anchorage, Alaska 99510, 1-907-272-7469 to report any problem I experience with this document.

DATE: SIGNED

The warning shall be in 30 point Arial font on 8.5 by 11 inch letter-size white paper in English and in a language comprehensible by the person receiving the document. A copy of this warning shall be given to the person receiving the document and another copy signed by the person receiving the document shall be maintained by the person preparing the document for five years.

Please send comments to: Executive Director, Alaska Bar Association, PO Box 100279, Anchorage, AK 99510 or e-mail to info@alaskabar.org by April 16, 2007.

## Alaska Bar Association Law Related Education 2007 Grant Awards

Six organizations have been awarded Alaska Bar Association grants for law-related education (LRE) projects statewide. The grants totalling nearly $10,000 were approved by the Board of Governors in January.

The LRE grant subcommittee appointed by the board developed and considered the following criteria in reviewing applications for the grants:

- Practical v. Education or Direct v. In-Direct
- Geography
- Will the project go forward without LRE funds?

Below is a summary of applicants and grant amounts:

| Name of Organization | Amount Requested | Amount Recommended by Subcommittee |
|---|---|---|
| Alaska Immigration Justice Project | $1,620 | $1,620 |
| Alaska Native Justice Center | $2,700 | $1,800 |
| Bethel Youth Facility | $1,009.47 | $1,010 |
| Delta Youth Court | $1,000 | $1,000 |
| Mock Trial | $2,500 | $2,500 |
| Nat'l Association of Women Judges | $3,000 | $2,000 |
| **Total Amounts** | **$11,829.47** | **$9,930** |

## Alaska Bar Association 2007 CLE Calendar

| Date | Time | Title | Location |
|---|---|---|---|
| March 15 | 8:30 a.m. – 12:30 p.m. | Motion Practice: Tactics, Strategies and Tips with Larry Cohen<br>CLE No. 2007-017<br>3.25 general CLE credits | Anchorage<br>Hotel Captain Cook |
| March 15 | 1:30 -4:45 p.m. | Ethics: The Game Show! with Larry Cohen<br>CLE No. 2007-018<br>3 Ethics CLE credits | Anchorage<br>Hotel Captain Cook |
| March 30 | 11:30 a.m. – 1:15 p.m. | Managing Cases Involving Persons with Mental Disorders: Psychotropic Medications –CLE #2007-003<br>1.5 general CLE credits | Anchorage<br>Hotel Captain Cook |
| May 18 | 11:30 a.m. – 1:15 p.m. | Managing Cases Involving Persons with Mental Disorders: Overview of Behavioral Community Health Programs –CLE #2007-004<br>1.5 general CLE credits | Anchorage<br>Downtown Marriott Hotel |
| June 7 | 8:30 a.m. – 12:30 p.m. | Alaska Natives & Real Property<br>CLE#2007-013<br>3.75 general CLE credits | Anchorage<br>Hotel Captain Cook |
| June 8 | 11:30 a.m. – 1:15 p.m. | Managing Cases Involving Persons with Mental Disorders: Law of Competence for Criminal Proceedings –CLE #2007-005<br>1.5 general CLE credits | Anchorage<br>Downtown Marriott Hotel |
| June 22 | 11:30 a.m. – 1:15 p.m. | Managing Cases Involving Persons with Mental Disorders: Effectively Communicating with Persons with Mental Disorders –CLE #2007-006<br>1.5 general CLE credits | Anchorage<br>Downtown Marriott Hotel |
| September 14 | 8:00 a.m. – 4:45 p.m. | Look Good Cross Examination With Terry MacCarthy and Ray Brown<br>CLE#2007-008<br>CLE Credits TBA | Anchorage<br>Hotel Captain Cook |
| November 2 | Morning TBA | Tort Law Update<br>CLE#2007-022<br>CLE Credits TBA | Anchorage<br>Hotel Captain Cook |
| November 8 | Morning TBA | Basic Wills & Trusts Drafting<br>CLE#2007-014<br>CLE Credits TBA | Anchorage<br>Hotel Captain Cook |
| November 30 | 8:30 a.m. – 12:30 p.m. | 13th Annual Workers' Comp Update<br>CLE#2007-012<br>3.75 general CLE credits | Anchorage<br>Hotel Captain Cook |
| December 13 | 8:30 -10:30 a.m. | Ethics at the 11th Hour<br>CLE 2007-011<br>2.0 Ethics CLE Credits | Anchorage<br>Hotel Captain Cook |

# In Memoriam

*Remembering Jake*

## William Hoover Jacobs

On June 29, 2004, my friend and former law partner, William Jacobs, died in Ft. Myers, Florida. The cause of his death was cancer. He was 69 years old.

His passing went unnoticed here. There was no obituary in the Anchorage newspaper and no notification to his friends in Alaska at the time.

Recently, one of Jake's friends from the University of Chicago Law School, mentioned his death in a telephone conversation with his first wife who lives in Alaska. She passed the information on to me.

I first met Jake in the autumn of 1960 at Jimmy's, a popular drinking establishment in Hyde Park, near the University of Chicago campus. He and his wife were engaged in a spirited conversation with several people at the bar. I had just entered the Law School and was feeling overwhelmed by the work and somewhat depressed by the incessantly serious nature of my fellow students, most of whom were younger than I was. Jake was relating a humorous incident that involved a law professor. His words were intermittently punctuated by the laughter of his audience. At some point, I joined the crowd and eventually was able to talk with him. I learned that he was beginning his third year at the Law School; and was somehow relieved to learn that he didn't take the establishment too seriously.

**While he was pursuing his higher education, Mr. Jacobs was employed as a carnival ride operator, a cement loader, a market research data analyst, an iceman, a truck driver and a sheriff's deputy.**

I subsequently found out that he coasted through law school, effortlessly, with outstanding grades. While he was pursuing his higher education, Mr. Jacobs was employed as a carnival ride operator, a cement loader, a market research data analyst, an iceman, a truck driver and a sheriff's deputy.

I saw a lot of Jake that year. He and his wife were regulars at Jimmy's and turned up at almost every off-campus party I attended. They also hosted some of the best ones. They were generally regarded by their friends as the "Nick and Nora" of Hyde Park. They impressed me as smart, sophisticated, and always amusing. Jake was a brilliant conversationalist and story-teller.

**Jake was a brilliant conversationalist and story-teller.**

After he graduated in 1961, Jake worked as a law clerk to an Illinois Court of Appeals Judge in Chicago. He continued to live in Hyde Park, but he wasn't around as much.

I was attending the summer session at the Law School in 1962, when I ran into Jake at a party and he informed me he had decided to move to Alaska. I didn't know anything about Alaska at the time and I don't think he did, either. I knew that he and his wife liked to go canoeing in the Boundary Waters between Minnesota and Canada whenever they had the chance. But, I think that is as far North as they ever went.

There was a party the evening before they left for Alaska. It lasted all night. I remember sitting on the sidewalk with Jake, his wife and my girlfriend and watching the sun come up. At some point, Jake consulted his watch and announced that the time had arrived for their departure. We said our goodbyes and watched as they drove slowly off in their heavily laden Nash Rambler down the long, empty street in the direction of Indiana.

After traveling several blocks, the car stopped. Then it began backing up until it was back at its starting place. Jake leaned out of the driver's window and asked: "Hey, Harry, which way is Alaska?"

At the time, I recall that I had serious doubts that Jake would ever reach Alaska. I suppose I expected him to return to Chicago at some point. During my third year in law school, I received a letter from his wife describing their arduous journey up the unpaved Alcan Highway and their arrival in Anchorage. A second letter reached me after I graduated from Law School and moved to Philadelphia. I learned that Jake had passed the Alaska Bar Examination on April 10, 1964 and was employed by the law firm of Kay and Miller.

I received no news about my friends after that – until the Good Friday Earthquake of 1964. The front page story in the Philadelphia newspaper was accompanied by a photograph of the ruins of an Anchorage apartment building. The address of the building in the caption was the same as the one I had for Jake in my address book.

A couple of weeks later, I received a telephone call from Jake assuring me that he and his wife were unharmed. Fortunately, they had stopped at a local watering hole with some of their friends on their way home from work when the earthquake struck Anchorage.

I first visited Alaska in the summer of 1970. When I looked up Jake, I discovered that he and his wife were divorced and that he was now the Director of Alaska Legal Services. I moved to Alaska the following year. Jake was practicing solo at this point and had an ownership interest in Chilkoot Charlie's. In 1972, Jake, Bernd Guetschow and I formed a law partnership. We practiced law together for several years until it became apparent that Jake's interests lay elsewhere and we split, amicably. We remained friends thereafter, although gradually, I saw less and less of him. He resumed solo practice for awhile until he became ill and stopped.

The last time I saw Jake was a chance encounter several years ago on the street near the Performing Arts Center. We talked briefly about old times. Then he told me he had sold his home and was moving to an island off the coast of Florida. He seemed for those few moments like his old self: buoyant, enthusiastic, and optimistic about his future.

I hope those last years in Florida were good ones.

*— Harry Branson*

## Richard Goldman

Richard Goldman, dean of the Santa Barbara and Ventura Colleges of Law, passed away in September after a one year battle with a rare form of intestinal cancer. He graduated from Hastings College of the Law in 1971 and served as a Supreme Court Clerk for Justice Roger Connor in Anchorage.

**M. Ashley Dickerson (at right) as she gathered at the Territorial Lawyers Picnic in 2002. (From left, Russ Arnett, Marge Cottis, and George Sharrock.)**

## M. Ashley Dickerson

Mahala Ashley Dickerson, 94, died Feb. 19 at her family homestead in Wasilla.

Dickerson was Alaska's first black attorney, who came to Alaska from Alabama to open a solo law office in 1959, the year Alaska attained Statehood. She was also the first female attorney in Alabama in 1948 and the second black woman admitted to the bar in Indiana in 1951.

She was known as an indefatigable advocate for the poor and underprivileged. "In my life, I didn't have but two things to do. Those were to stay black and to die. I'm just not afraid to fight somebody big," she told the Anchorage Daily News in 1984, when, at age 71, she was still working 12-hour days at her Fairview law office. "Whenever there's somebody being mistreated, if they want me, I'll help them."

Dickerson often took clients who didn't have the means to pay, said Leroy Barker, of the Alaska Bar Association Historians Committee, who practiced law with Dickerson in the 1960s. "I don't think anybody thought of her as a black woman lawyer, she was just a lawyer," he said. "I think she worked very hard to get where she was, and she was a strong personality."

Attorney Rex Butler, a friend and colleague, said, "I remember one lawyer telling me one time, 'Rex, you see those mountains out there? Those mountains are littered with the bones of lawyers who underestimated M. Ashley Dickerson'."

Dickerson grew up in Alabama on a plantation owned by her father. She attended a private school, Miss White's School, where she made a lifelong friendship with civil rights leader Rosa Parks.

She graduated from Fisk University in 1935 and was one of four women in the class of 1936 to obtain law degrees. She brought her three sons to Alaska and homesteaded in the Mat Valley after practicing law in Alabama and Indiana. "I didn't know a single person, and there were very few black people in Alaska then, but everyone welcomed me, white and black alike," she said in a 2001 interview.

In 1995, she was awarded the Margaret Brent Award from the American Bar Association, an honor also given to U.S. Supreme Court Justices Ruth Bader Ginsburg and Sandra Day O'Connor.

Dickerson wrote a book about her life, "Delayed Justice for Sale," in 1998. She continued to practice law until she was 91 and continued to share memories and historical anecdotes at the annual summer Territorial Lawyers gathering.

Ashley Dickerson is survived by her sons John and Chris and was buried with her deceased son Alfred on the Mat Su homestead. A memorial will be held at a later date.

*--Portions excerpted from the Anchorage Daily News*

**Quote of the Month**

**"There is nothing wrong with America that the faith, love of freedom, intelligence and energy of her citizens cannot cure."**

***Dwight D. Eisenhower, US general & Republican politician (1890 - 1969)***

# In Memoriam

## Paul M. Williams

Seattle attorney and Alaska Bar member Paul Williams, 80, passed away Dec. 21 in Seattle of diabetes. An avid outdoorsman until late in life, Mr. Williams was a founding member and president of the Seattle Mountain Rescue in 1953, and wrote a guide for responding to mountain accidents that is still in use.

A worldwide adventurer in expeditions ranging from a search for Noah's Ark in Turkey to trekking the Arctic seeking the remains of 19th Century British explorer John Franklin, Williams also "responded to emergencies, whether it was the famous John Day rescue on Mount McKinley in 1960, or dozens of rescue missions" in the Pacific Northwest," wrote the Seattle Times in December. He organized a meeting at Mount Hood in 1959 to draft incorporation papers for a volunteer association that would become the National Mountain Rescue Association.

He is survived by his wife Pat and eight sons and daughters, and left them with a special "will" upon his passing, reprinted below. (Memorials may be made to to the Tarahumara Mission in Creel, Mexico; American Diabetes Association, Alzheimer's Foundation, or any charity.)

•

### A MOUNTAINEER'S WILL

Having disposed of my material possessions, I now turn to those items I hold in great esteem but which are without material value in this life.

To all of my children I leave the most important things of my life: the sparkle of snowfall, the blue of ice in a serac poised against a blue sky, the clean firm grip of good rock, the music of a tiny siream in an Alpine meadow, the smell of heather in bloom, the graceful, tilted head of an avalanche lily, the clink of pitons and carabiners, the song of a primus in darkness of high camp, the flicker of flashlights in the pre-dawn climb, and the indescribable beauty of an Alpine dawn from high on a mountain.

The feel of comradeship as the team moves swiftly up the ice, the moments when fingers of fear clutch at your insides on exposure, and perhaps moments of terror, the knowledge that life and death are sure, swift and true.

But above all, I leave to you, my beloved children, those few short moments of attainment and peace on the summit, secure in the knowledge you have conquered not the mountain so much as yourself. Those few moments in the sunlight you share with God, Who has written His signature all about you as you sit in the magnificent cathedral in the sky created by God, and which we mortals can share but a brief time. Where you must accept the ultimate truth that we have but one end in our short life, before you descend again to the burdens of the world, to shoulder the cross of responsibility to the family.

I know not whether you, my children, will follow in my steps to the Alpine world and as a father I hope that you will and, yet, knowing all too vividly the mountain dangers, I also fear that you will. But whether you go to the high places or view them from afar as the sunset paints a crimson glory across the sky, and the light slips from the mountain meadow, remember the restless spirit of your father amid the moss and heather, seeking ever his eternal rest with God.

*--Paul M. Williams, December 2006*

# Law Library News -- New Services!

*By Catherine Lemann, State Law Librarian*

### Toll free number

We are pleased to announce that the law library has a toll free number: 888-282-2082. This number is for use by all Alaskans. It reaches the Anchorage reference desk which is staffed Monday – Thursday 8:00 a.m. – 6:00 p.m., Friday 8:00 a.m. – 4:30 p.m., and Sunday noon – 5:00 p.m.. While we cannot give legal advice, we can often provide information to enable citizens to locate the legal information they need.

### New online reference service

If you don't know about HeinOnline, you should. It is a web-based subscription service that provides access to images of law reviews and other legal resources. Users can browse law reviews or use the search feature. You can search for law review articles with certain words in the title, by author, or with a full-text search. This is an example of how law libraries are not limited by what is contained within our physical space.

What differentiates HeinOnline from a Westlaw or Lexis journal search is the breadth of coverage. Westlaw and Lexis coverage generally begins in the 1980s. HeinOnline has the whole run of many law reviews, beginning with Volume 1. Titles also include law reviews that no longer are in publication. Historical research is not something people do everyday, but when you need an article from an early law review it is a fabulous resource. The database also includes law reviews from England, Scotland, Australia, Canada, and more.

HeinOnline has more than just law reviews. The service also has a database of the Code of Federal Regulations extending much further back than Westlaw or other online sources. The United States Statutes at Large are searchable from 1789 – 2004. Looking for a classic treatise by Roscoe Pound, Oliver Wendell Holmes, or even Aristotle? The Law Classics Library has treatises from the 1800's and early 1900s. No where else would you find online access to a title such as, "Every Woman Her Own Lawyer : A Private Guide in All Matters of Law, of Essential Interest to Women, and by the Aid of Which Every Female May, in Whatever Situation, Understand Her Legal Course of Redress, and Be Her Own Legal Adviser," by George Bishop (1858)

HeinOnline Content:
1,006 Law Journals
Code of Federal Regulations 1938 – 1983
Federal Register Vol. 1 (1936) – Vol. 71, #169 (August 2006)
U.S. Reports 1754 - date
Legislative Histories of Selected Federal Laws
U.S. Statutes at Large 1789 – 2004 (searchable)
1,063 titles in the Legal Classics Library

While this service is only available in the larger law libraries, content can be sent elsewhere by email, mail, or fax. Please check out HeinOnline the next time you're in the library in Anchorage, Juneau, Fairbanks, Ketchikan, or Kenai. Or, call us on the new toll free number (888-282-2082) for more information.

# Court launches Pro Se Website

Over the past several years, the number of people representing themselves in both the trial courts and on appeal has increased significantly. The Supreme Court is interested in providing access to self-represented parties to raise issues on appeal and also wants to receive better filings and briefs that comply with the Appellate Rules.

Therefore, the Court has worked with the Family Law Self-Help Center to design a website to educate pro se litigants on appellate process. The website is written in plain language and uses a frequently-asked-question format. It includes basic forms to start a case, a sample brief, a form to request oral argument, and generic motion practice forms.

While the appeals website is intended to help self-represented parties handle their own appeal, we urge them to hire an attorney if possible. Several places throughout the website suggest consulting with an attorney and link to a section called "Finding a Lawyer."

"Finding a Lawyer" includes information about the Alaska Bar Association's Lawyer Referral Service and a description of unbundled legal services and a link to the list of unbundled service attorneys identified through the Family Law Section. The Alaska Court System cannot refer to an individual attorney, but can refer to lists maintained by the Bar Association or its individual sections.

**Sign up with the Lawyer Referral Service or contact the Alaska Bar Association to be on a list of attorneys willing to provide unbundled legal services.**

We anticipate the appeals website will receive significant traffic as pro se filings have increased and will continue to go up. As legal advice throughout the appeals process is clearly desirable from the perspective of the litigants as well as the court, we encourage you to sign up with the Lawyer Referral Service or contact the Alaska Bar Association to be on a list of attorneys willing to provide unbundled legal services for civil appeals from Superior Court to the Supreme Court.

You can view the Bar Association's website at www.alaskabar.org to find their current listing for unbundled service attorneys from the Family Law Section. With enough participation, the Bar may create a list of unbundled service attorneys willing to do discrete task representation on appeals, identifying the case type, and tasks available for hire.

We welcome feedback on the website and any experiences that you may have litigating against self-represented parties who use the website. We hope this website will be a tool to help pro se parties raise their legal issues, make the work of the justices and court staff more efficient by dealing with parties who have a better understanding of the process, and help your interaction with opposing pro se parties to be a bit smoother.

In addition, we hope you receive referrals from the website under "Finding a Lawyer" either through the Lawyer Referral Service or through an unbundled services list.

Links to the website can be found on:
- the court system homepage: www.state.ak.us/courts/
- the appellate courts homepage: www.state.ak.us/courts/appcts.htm#how
- and the FLSHC introductory page, via FLSHC glossary term "Appeal":
www.state.ak.us/courts/glossary.htm#appeal

Please browse the new website and let us know if you have any questions, comments, or suggestions. We look forward to hearing from you.

Marilyn May, Clerk of the Appellate Courts
mmay@appellate.courts.state.ak.us
Stacey Marz, Co-Director, Family Law Self-Help Center
smarz@courts.state.ak.us

Pro Bono Corner

# Atkinson dedicated to Bean's Cafe

The severely indigent and homeless in America are a chronically underserved population on many fronts: housing, economics, health care, and civil rights. In 2005, two leaders with legal services providers—Erick Cordero and Kara Nyquist—sought to ways to make a much needed connection to the estimated 4,500 homeless living in Anchorage. Their efforts brought them to the Steering Committee of the Anchorage Stand Down (an annual two-day event which provides several health and social services to homeless veterans) and to Bean's Café, where the poorest in our community, mentally ill, homeless, street people, and the needy elderly come for meals, a warm place, and referrals to appropriate social service agencies. In cooperation with then Social Services Director Brian Anderson, the Alaska Legal Services Corporation developed a monthly legal clinic for Bean's Café's consumers and began looking for the right volunteer to fit the need.

It didn't take long before attorney Kathy Atkinson answered their call for help.

Kathy Atkinson has always done pro bono work; in fact, she was the recipient of the Pro Bono award in 1992; however, she believes that her work at Bean's Café has proved to be some of the most varied and interesting in her legal career. It's no surprise that both Kathy Atkinson and Bean's Café have been doing important work in our community for nearly 30 years. The attorney and the organization are committed to helping those less fortunate.

Kathy learned early on that establishing trust with Bean's Café's consumers would be an important step. Consistency, listening, and helping clients stay invested in their own case were pivotal to becoming a trusted person in the cafeteria/office at Bean's. She also learned that requesting a sign up for appointments helped to build continuing relationships among the more than 30 clients she's served since beginning the clinic.

Among those 30 plus clients, the kinds of cases Kathy sees most frequently are those dealing with housing, landlord/tenant, small claims, and labor issues. While determining whether there is legal merit to the consumer's complaint, Kathy also provides brief services by writing a letter, making a phone call, or researching a suitable social service or administrative agency to assist the consumer. She often finds that many of Bean's consumers have trouble navigating the thorny State system for information and using her as an information source has proved to be invaluable to many.

Kathy Atkinson chats at Bean's Cafe.


One source of information most helpful to Bean's consumers is about emergency shelter and temporary housing. The northeast wall of the Bean's cafeteria is a beautiful mosaic mural featuring Mount Susitna's vista. Spanning the length of the mural are plaques with the names of those homeless who have passed since 1988 and sadly, each year the list grows longer. No one wants to be forgotten after they die, so on December 21 of each year, Bean's Café holds a candlelight ceremony in honor of each person who has passed.

We are confident that some of Kathy's important work at Bean's Café has kept fewer names on that list.

Finding the time to volunteer has never been an issue to Kathy. She often devotes her lunch hour to chair Section meetings, uses her own resources and email address for client contact, represents clients in addition to her work at Bean's Café, reviews content for AlaskaLawHelp.org, and tirelessly advocates on behalf of those needing access to justice. We are deeply thankful for her contribution of time, talent, and energy to our community, Bean's Café, and especially Alaska's citizens in need.

*Photos by Jamie Lang Photography*

AlaskaAdvocates.org
Doing Justice in The Last Frontier

## Are you a pro bono attorney assisting one or more of these programs?

- Alaska Legal Services Corporation's Volunteer Attorney Support Program
- Alaska Pro Bono Program, Inc.
- Alaska Network on Domestic Violence and Sexual Assault's Pro Bono Program
- Alaska Immigration Justice Project's Pro Bono Program

If so, you'll want to join AlaskaAdvocates, part of a national network of advocate-oriented web sites designed to promote and support volunteer service by attorneys.

Your free membership is waiting.
Go to **www.AlaskaAdvocates.org** and click on the "Join This Area" button.

If you aren't a pro bono panel member but would like to volunteer your services on behalf of a low-income Alaskan, please contact one of the following pro bono program directors:

Erick Cordero (ALSC's Volunteer Attorney Support Program) at
(907) 272-9431 ext. 521
Kara Nyquist (Alaska Pro Bono Program, Inc.) at
(907) 301-8873
Christine McLeod Pate (ANDVSA Pro Bono Program) at
(907) 747-7545
Robin Bronen (Alaska Immigration Justice Project) at
(907) 279-2457
Krista Scully (Alaska Bar Association Pro Bono Director) at
(907) 272-7469

AlaskaAdvocates is a project of Alaska Legal Services Corporation. For more information about this project, contact Beth Heuer at Alaska Legal Services at (907) 374-7305 or bheuer@alsc-law.org

## Anchorage giving back: Bar Association makes annual donation to Bean's Café

**2006 Anchorage Bar President Ryan Fortson presented $2,000 to Bean's Café Executive Director James Crockett for their annual donation which included a special gift in honor of longtime friend and board member, Ben Walters.**

For the past 20 years, the Anchorage Bar Association has made an annual $1,000 gift in December to Bean's Café in honor of the attorneys that have passed away that year. They gave $2,000 in 2006 because of an additional gift in the name of their longtime board member and volunteer Ben Walters of Homer and Anchorage.

A quick tally means that the Anchorage Bar has given no less than $21,000 to Bean's since 1987.

In addition, they donate all leftover food and appropriate beverages from their social and professional events to Bean's as part of their agreement with their various caterers.

This is a great story about a long-standing donor relationship with a provider of much needed community services. If you know of similar stories among our legal community, please let me know: Krista Scully, Pro Bono Director, Alaska Bar Association at scullyk@alaskabar.org or at 907-272-7469.

ALSC President's Column

# ALSC welcomes new staff members

*By Vance Sanders*

Please join me in welcoming two new ALSC attorneys. I am pleased to announce that ALSC's Nome office, which had remained unstaffed since July 2005 and had been without an attorney since September 2004, re-opened its doors on 1 February 2007 upon the arrival of staff attorney Wesley Klimczak. Wes, a 2004 graduate of the University of Oregon School of Law, comes to us from the Tazewell County State's Attorney's Office in Peoria, Illinois. Wes is working under the Legal Assistance to Victims grant funding and brings to the job his experience in prosecuting DV offenders and providing advice on seeking protective orders.

I also want to welcome staff attorney Lisa Marie Ford Wilson, who is working on the "Children at Risk" project in the Anchorage office. Lisa formerly worked with the Public Defender's Office in Anchorage, following a clerkship with Alaska Supreme Court Justice Alex Bryner, and is a graduate of the University of California at Davis School of Law. Welcome, Wes and Lisa!

### Guess and Rudd Challenge Met!

Once again, the generosity of the law firm of Guess and Rudd in extending its challenge grant to ALSC combined with phenomenal support from members of the legal community throughout Alaska has produced a total of over $100,000 for ALSC's Robert Hickerson Partners in Justice campaign. Law firms and attorneys who pledged $5,000 or more to meet the challenge include:

Vanessa White
Mark Regan
Feldman & Orlansky
Heller Ehrman with Jim Torgerson & Morgan Christen
Mauri Long
Perkins Coie
Dorsey & Whitney
Tanana Valley Bar Association – Cheechakoes, led by Borgeson & Burns
Tanana Valley Bar Association – Sourdoughs, led by Charlie Cole
Patton Boggs
The Juneau Cluster (members of the Juneau Bar)

Donations from the following contributors were combined to meet the remainder of the challenge:

Birch Horton Bittner & Cherot
Burr Pease & Kurtz
ALSC Staff
Preston Gates & Ellis
Holmes Weddle & Barcott
Hughes Bauman Pfiffner Gorski & Seedorf, LLC
Members of Sonosky Chambers
Katherine Alteneder
Donna Willard
Marie C & Joseph Wilson Foundation, designated by Josie Garton
Eric Leroy PC
Jamin Schmitt St. John
Members of Ashburn & Mason
Carol Daniel
Members of Jermain Dunnagan & Owens
Baxter Bruce & Sullivan
Vance Sanders
Art Peterson
Faulkner Banfield
Clapp, Peterson, Van Flein, Tiemessen & Thorsness
Janidlo Law Offices

Our sincere thanks to all who made the Guess and Rudd challenge a success again this year. And a big thank you to Guess and Rudd for its much-appreciated support of ALSC.

The end of the Guess and Rudd challenge does not signal the end of the Campaign, which will continue through the Bar Convention. Through the efforts of CIRI Vice President Greg Razo and General Counsel Ethan Schutt, CIRI has issued its own challenge to the other ANCSA Corporations throughout the State to match CIRI's generous $5,000 contribution.

### Conclusion

One of the advantages of the Partners in Justice Campaign is that our board members and others get on the phone to the legal community to talk about Alaska Legal Services, opening the door to feedback, both positive and negative. Even if the state and federal governments were able to fully fund ALSC's mission (which they don't), it would still be a healthy exercise for ALSC to turn to the legal community in this way, just as public broadcasting turns to its listeners and viewers, giving them an opportunity to provide substantive input along with their contributions.

ALSC's Executive Director Andy Harrington is always open to comments about ALSC and its mission, whether favorable or "constructive criticism." Of course, he can't guarantee that ALSC's policies will change in response to every complaint, and, particularly where the complaint comes from an opposing party or an opposing attorney, it may not be possible for him to provide information on the results of any internal inquiries he may make in response to the complaint. Further, ALSC has the same responsibility that we all do as lawyers not to shirk our duties as advocate merely because of the unpopularity of the matter, or of the client. However, with the understanding that ALSC can't please everyone, it still does try as an agency to be responsive to comments as to what it is doing right, what it is doing wrong, and what it is doing that could be done better.

Pro Bono Corner

Promoting a law course

# Young lawyer public service project introduced

*By Kara A. Nyquist*

Do you know of any youth or individuals considering the practice of law? Are you looking for a volunteer opportunity to share with minority students or interested in volunteering for Law Day this year? This year the public service project of the American Bar Associations Young Lawyers Division (YLD) is "Choose Law: A Profession for All."

The Choose Law project is focused on educating high school students of color and minorities about the legal profession and encouraging them to consider law as a career. The primary motivational tool of the project is an eight minute video featuring attorneys and judges discussing why they became attorneys, some of the challenges and rewarding experiences they faced as attorneys, and the importance of diversity in the profession.

The YLD has produced a multipage written guide as an instructional and motivational tool as an introduction to the legal profession. The website for the project is located at www.abayld.org/chooselaw. You can receive a free copy of the DVD and written materials by filling out a brief order form at www.abanet.org/yld/chooselaw/requestmaterials.shtml.

The Choose Law project made its debut in Anchorage on Martin Luther King Jr. Day at four recreation centers to share the project with youth and answer questions about the legal profession. Thank you to volunteers attorneys Barbara Hood and Barbara Jones; Anchorage Young Lawyers President Bill Falsey, Daniel Garcia, Julie Fields, Sunshine Bradshaw, and Vik Patel.

If you are interested in volunteering for Law Day to present the Choose Law project, please contact Krista Scully, Pro Bono Director at the Alaska Bar Association at scullyk@alaskabar.org. Additional information and/or questions about the project can be directed to Kara Nyquist at karajd2000@aol.com.

*Kara A. Nyquist is District Representative of ABA/YLD for Alaska & Hawaii, 2006-2008*

**Anchorage paramedic and attorneys Vic Patel and Julie Fields team up to deliver the Choose Law project at the Northeast Community Recreation Center.**


**Young Lawyer President Bill Falsey reviews MLK Day events and the Choose Law project with a young participant at the Fairview Recreation Center.**

*Photos by Krista Scully*

# Christy Johnson joins firm as associate attorney

Pradell and Associates is pleased to announce that Christy Johnson has joined the firm as an associate attorney.

Ms. Johnson received her Bachelor's Degree in 2002 from Gonzaga University, her Juris Doctorate Degree in May of 2005 from Gonzaga School of Law, and she became a member of the Alaska Bar Association in 2006. She has previously been a manager and a chef at the Tutka Bay Wilderness Lodge.

Christy Johnson

# Landye Bennett Blumstein welcomes Kompkoff as associate

Landye Bennett Blumstein LLP is pleased to announce that Noelle S. Kompkoff recently joined the law firm as an associate in the Anchorage office.

Kompkoff will focus her practice on Alaska Native law, corporate, business, and commercial transactions, and Native American law and policy. Before she joined Landye Bennett Blumstein LLP, she was an associate lawyer and legal assistant for the Tatitlek Corporation. She received her B.A. from Western Washington University in 1996 and her J.D. from the Willamette University College of Law in 2006. She also obtained an Advanced Paralegal Certificate from Edmonds Community College in 2002. Ms. Kompkoff held positions as a general assignment reporter and trade show coordinator between her undergraduate studies and law school.

Founded in 1955, Landye Bennett Blumstein LLP represents clients throughout Alaska, Oregon and Washington. The Anchorage and Wasilla offices emphasize Alaska Native law, commercial transactions, business and corporate representation (including nonprofit and public corporations), real estate, and general civil litigation in state and federal courts. In addition, the firm represents clients in environmental law, mergers and acquisitions, high technology, intellectual property, personal injury and tax law.

ALASKA TEACHING JUSTICE NETWORK

***Advancing Law-Related Education for Alaska's Youth***

The Alaska Teaching Justice Network
would like to thank the following organizations and individuals
for their generous financial support during 2006:

Red, White & Blue Sponsor ($1000):
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**Did You Know**

**You get VCLE credit for writing substantive law-related articles for the Bar Rag.**

# Bar People

**If you've changed firms, relocated to a new community, etc. please send us your information for Bar People, to info@alaskabar.org.**

**Jim Kentch** has decided to stay and practice law in Santa Fe, New Mexico after earning two Masters' degrees (in Liberal Arts and Eastern Classics) from St. John's College there. He also received the prize for the best Sanskrit translation.

**Kimberly Allen**, formerly with the Municipality of Anchorage, is now with Jermain, Dunnagan & Owens.....**Bruce Anders**, formerly with the US Dept. of the Interior, Solicitor's Office, is now with DNR, Division of Oil & Gas.....**Lauri Adams**, formerly with Alaska Conservation Foundation, is now with Alaska Communications Systems.....**Anne Bandle**, formerly with the Attorney General's Office in Anchorage, is now with Lynch & Blum.

**Nora Barlow**, formerly with Russell, Tesche, et.al., is now with Delisio Moran et.al.....**Kirsten Bomengen**, formerly of Juneau, is now with the ABA/CEELI program in Vladivostok.....**Mark Cucci**, formerly with the Public Defender Agency, is now with the Office of Public Advocacy.....**Joe Cooper**, formerly with Russell, Tesche, et.al., is now with the Department of Law in Anchorage.....**Rob Corbisier**, former Special Assistant to the Governor, is now with the Anchorage District Attorney's Office.

**Marcia Davis**, formerly with ERA Aviation, is now with the Department of Revenue.....**Steve Elliott**, formerly with Hall & Elliott in Fairbanks, has opened the Law Office of Steve L. Elliott.....**Diane Foster**, formerly with the Public Defender Agency, is now with the Anchorage Attorney General's Office.....**Jill Farrell** is now with Wade, Kelly & Sullivan in Anchorage.

**Holly Handler** has relocated to Juneau and is now with ALSC in Juneau.....**Helena Hall**, formerly with Perkins Coie, is now with NANA Development Corp.....**Stewart Merrill**, formerly with Lynch & Blum, is now with Hughes Bauman, et.al.....**Milton Moss** is now with Clapp Peterson et.al..... **Jill McLeod**, formerly with United Companies, is now with Conoco Phillips Alaska.

**Heather Nobrega**, formerly staff counsel with the Alaska Legislature, is now with the District Attorney's Office in Anchorage.....**Andrea Russell**, formerly with OSPA, is now with the Office of Victims' Rights.....**Michael Sewright**, formerly Of Counsel to Burr Pease & Kurtz, is now with the Attorney General's Office in Anchorage.....**Jim Stanley**, formerly with Amodio, Stanley & Reeves, is now an Administrative Law Judge for the Alaska Office of Administrative Hearings.

**David Stebing** has relocated from Anchorage to Oakland, CA.....**Danielle Simmons**, formerly with the District Attorney's Office in Fairbanks, has opened her own law office in Fairbanks.....**Tina Seller**, formerly with Hartig Rhodes, et.al., is now with Amodio Stanley & Reeves.....**Jane Sebens**, formerly in private practice in Haines, is now an Assistant City & Borough Attorney for the City & Borough of Juneau.

**Gail Schubert**, formerly Of Counsel to Amodio Stanley & Reeves, is now with Bering Straits Native Corp.....**Charles Tunley** has relocated from Washington to Arizona.....**Joan Unger**, who formerly had her own law office, is now with Lynch & Blum..... **F. Steven Mahoney**, formerly Of Counsel to Hughes Bauman, et.al., is now Of Counsel to Manley & Brautigam.

**Timothy M. Stone**, formerly of the law firm of Stone & Jenicek, PC, has joined the law firm of Holmes Weddle & Barcott, PC as Of Counsel. Stone has practiced law in Alaska since 1975 with an emphasis on insurance defense and coverage litigation. He brings to Holmes Weddle & Barcott his broad experience in insurance litigation issues, Stone joins the firm with his associate, Alexander K.M. Vasauskas, who also has a practice emphasis and substantial experience in insurance litigation issues.

# Add these to the list

VOLUNTARY CONTINUING LEGAL EDUCATION
(VCLE) RULE – BAR RULE 65
6TH REPORTING PERIOD –
JANUARY 1, 2005 – DECEMBER 31, 2005

The following is a corrected list of active Alaska Bar members who voluntarily complied with the Alaska Supreme Court recommended guidelines for 12 hours (including 1 of ethics) of approved continuing legal education in the 2005 reporting period.

Gregory Fisher
Peter Maassen
Keith Saxe

ESTATE PLANNING CORNER

# Some sample estate planning letters

*By Steven T. O'Hara*

At Will and Trust signings, we often give the client a folder with letters on certain subjects that we had previously discussed. Then the client will have written reminders of certain matters to which to refer from time to time, and additional time will not be used at the signing to review previously discussed items.

Following are sample letters. Feel free to incorporate them into your practice. Subsequent issues of this column will have more sample letters.

## Cover Letter

***Dear Client:***

Enclosed in this folder are numerous reminder letters relating to your estate planning.

As time permits, please study each of these letters and let us know if you have any questions or directions.

Thank you for giving us the privilege of assisting you in your estate planning.

## Insurance Trust

***Dear Client:***

This is to remind you to consider an Insurance Trust.

Currently all of the insurance on Client's life, for example, would be subject to federal estate tax, which could be as high as 45%.

An Insurance Trust could eliminate exposure to estate tax, while allowing the proceeds to be accessible to Client's spouse during her lifetime.

If you have any questions, please call.

## Insurance To Pay Estate Tax

***Dear Client***:

I have recommended you consider that the purchase of life insurance may make sense in terms of paying estate tax with discounted dollars. In other words, the premiums on the policy could be substantially less than the estate tax payable.

Life insurance can also provide the important benefit of liquidity so that your retirement plans would not have to be invaded to pay taxes.

I mentioned a life insurance trust as the best vehicle in which to own the insurance, and I also mentioned that you may want to consider a charitable remainder trust in conjunction with a life insurance trust.

If you want to avoid a life insurance trust, your children could own the life insurance directly. But we would recommend a life insurance trust over direct ownership for numerous reasons, which we would be happy to discuss with you.

If you would like to consider this subject further, please call sooner than later. The cost of any life insurance your family or a trust may buy increases with each passing year.

Thank you.

**"Following are sample letters. Feel free to incorporate them into your practice."**

## Life Insurance

***Dear Client:***

This is a reminder to review the adequacy of any life insurance on which you or others are depending.

You or a company or entity you created or administer (such as a trust) may own one or more life insurance policies.

We recommend you have any and all life insurance (and any related plan documents) reviewed in every detail. You will want to make sure that the life insurance policy is adequate for its intended purpose and will last as long as it is needed.

Horror stories abound regarding life insurance policies that lapse or are otherwise not there when needed.

You have not retained us to review any life insurance policy. If you would like us to review any life insurance policy, please send us a note to that effect along with complete copies of all relevant documents.

Thank you.

## Umbrella Policy

***Dear Client:***

This is a quick reminder regarding liability insurance.

As we have discussed, it is important to protect assets you own (or manage, such as through a trust or an LLC) from loss due to a catastrophe or other risk. In addition to "typical" risks we think of in Alaska -— fire, flood, earthquake, volcanic eruption —- a very real hazard is *liability* in the event someone is injured on property or otherwise incurs loss.

*Liability insurance* is a way to deal with the risk of liability, whether the coverage is called an "umbrella" or otherwise. We recommend you have, at least as often as annually, a frank and full discussion with your insurance agent regarding your specific liability insurance needs and how best to protect assets and peace of mind.

Please also consider whether there is any member of your family who you could remind to consider insurance, including liability insurance.

Thank you.

**Please remember to obtain a "name endorsement" on all insurance policies relating to trust property.**

## Real Estate Ownership

***Dear Client:***

In your capacity as Trustee of the trust, you should have received the originals of the recorded deeds for the real estate owned by the trust. Please check your records and let us know if you have not received those originals.

In addition, we recommend you consider obtaining a limited title report from a title company in order to verify, to your satisfaction, that the trust is the 100% owner of the real estate. As you know, sometimes these reports are called "litigation reports" or some other similar name.

The trust could also take this opportunity to purchase more title insurance on the various properties if the title insurance originally purchased is insufficient.

Please remember to obtain a "name endorsement" on all insurance policies relating to trust property. These insurance policies would include fire insurance and other casualty loss insurance, title insurance, and liability insurance. A "name endorsement" would add the trust and you as Trustee as insureds under the applicable policy.

We will leave these matters in your good hands. Please let us know if we may be of assistance.

As always, my very best.

## INTERESTED IN SUBMITTING AN ARTICLE TO THE ALASKA BAR RAG?

The Bar Rag welcomes articles from attorneys and associated professionals in the legal community. Priority is given to articles and newsworthy items submitted by Alaska-based individuals; items from other regions are used on a space-available basis. Remember -- you get VCLE credit for substantive law-related articles printed in the *Bar Rag*.

**A Special Note on File Nomenclature (i.e. filenames)**

Use descriptive filenames, such as "author_name.doc." Generic file names such as "Bar Rag September" or "Bar Rag article" or "Bar article 09-03-01" are non-topic or -author descriptive and are likely to get lost or confused among the many submissions the Bar Rag receives with similar names such as these. Use, instead, filenames such as "Smith letter" or "Smith column" or "immigration_law."

Submission Information:

By e-mail: Send to oregan@alaskabar.org

By fax: 907-272-2932.

By mail: Bar Rag Editor, c/o Alaska Bar Association, 550 W. 7th Avenue, Suite 1900, Anchorage, AK 99501

MILITARY LAW

# USERRA: Protection of civilian employment rights

*By Todd Sherwood*

The Uniformed Services Employment and Reemployment Rights Act, commonly known as USERRA, is a federal law that protects the civilian employment rights of members of the Reserves and the National Guard who are called to active duty or are otherwise performing military duty.

With the large number of Guard and Reserve members being called to active duty since 9/11 the chances are good that those of you practicing personnel law at any level will encounter this law. As an attorney for an employer you may have the chance to advise either a public or a private employer of their obligations under the law. Hopefully, that advice will be in the nature of preventative law, before there are any violations. On the other hand, as an attorney representing an employee you may be find yourself helping to enforce the protective provisions of the law.

The military reserves include the Air and Army National Guard, as well as the Army, Air Force, Navy, Marine and Coast Guard Reserves. The National Guard members belong to the individual states unless and until they are called to active duty. The governor of each state is the Commander in Chief of the Guard members until that time.

The Reserve members of each service are, like the Guard members, part-time military members but unlike the Guard members, are always part of the federal system, with the President being their Commander in Chief. Nonetheless all Guard and Reserve members are considered to be part of the overall federal military reserve system and provide a trained and ready force that can be called on to supplement the full time active duty military.

The number of Guard and Reserve members called to active duty since 9/11 has varied quite a bit, but by any measure the numbers are higher than they have been at any time since at least World War II and the Korean War. For example, in August 2005, according to official Department of Defense figures, nationwide there were 141,390 members of the Reserves and Guard on active duty. Of those 353 were members of the Guard and Reserve forces in Alaska.

**"Without USERRA to protect their civilian job rights they might well not have a job to come back to."**

According to the latest figures available at this writing, on January 31, 2007 there were 91,812 Guard and Reserve members on active duty nationwide. While that number is down from the previous number, Alaska's contribution is up considerably with a total of 745 Guard and Reserve members on active duty. Most of this number represents the well known deployment of Alaska Army National Guard soldiers to the Middle East this past year.

The number of those Guard and Reserve members on active duty vary depending on the needs of the U.S. military as it attempts to fulfill its missions in the United States and around the world. Although the tendency is to think of Guard and Reserve members as deploying primarily overseas to join the missions in Iraq under Operation Iraqi Freedom or Operation Enduring Freedom in Afghanistan, many may participate in other missions around the world or even in the U.S. For example, many Guard and Reserve members are currently deployed as part of Operation Noble Eagle, a stateside mission designed to protect U.S. skies and prevent another 9/11, while others have deployed in support of Operation Jump Start to assist federal civilian agencies along the southern boarder of the country.

**Most of our Alaska Guard and Reserve members who deploy leave behind not only family and friends, but a civilian job.**

Most of our Alaska Guard and Reserve members who deploy leave behind not only family and friends, but a civilian job. Without USERRA to protect their civilian job rights they might well not have a job to come back to.

Under the law a member of the Guard or Reserves cannot lose their civilian job simply because military duties keep them away from work. This law covers a Guard or Reserve member under many different situations besides the classic case of being called to federal active duty for an extended time. Generally speaking, at a minimum, all Guard and Reserve members are required to perform 30 days of military service per year (the classic weekend a month, plus two weeks a year). USERRA protects members serving even the minimum number of days, and in the case of Guard members it covers them even if they are not on federal active duty orders. In summary, it covers a military member for all military duties related to federal active duty or federal training. There is an exception for military duties that relate strictly to a state mission. That will be explained in more detail below.

**The law also requires that the civilian employer put the member back to work at the same job or similar job as the one they held when they went on full time military duty.**

Often times, as in the case of the recent Alaska Army National Guard deployment, entire units are put on orders and called up to active duty. From a technical standpoint, this is considered an involuntary call to active duty. Don't let the term confuse you. This does not mean that they are unwilling to go on active duty, just that as a unit they were waiting their turn. In other words, they are not seeking the mission out; they are letting the mission come to them. On the other hand many members of the Guard and Reserve can, and will, seek opportunities to serve in extended active duty assignments. These opportunities are circulated in the military community as another way of filling slots for military missions. Members of the Guard and Reserve chosen for these assignments are considered to have responded to a voluntary call to active duty. This term would also often apply to a member seeking to attend short term training that they want to better perform their military duties. The important legal point to this distinction is that the legal protections of USERRA are the same whether the member has been called to active duty voluntarily or involuntarily.

Under the law the employer cannot fire a member of the reserves or take any other action against the member simply because the member is serving in the Guard or Reserves and had to be away from work to perform military duty. The law protects the member's reemployment rights for an aggregate total of five years of military service. There are a number of exceptions that can extend the protection to longer than five years. The law also requires that the civilian employer put the member back to work at the same job or similar job as the one they held when they went on full time military duty. There are also detailed provisions relating to promotions, seniority, and other benefits.

Unlike laws such as the Americans With Disabilities Act and the Family and Medical Leave Act, which apply only if the employer has a certain number of employees, USERRA applies to all employers no matter how few employees they might have. On the other hand if a member is not an employee, but is instead a partner in the business or law firm, they are not covered under the law, since they are in the nature of an owner and not an employee.

In addition to the rights they have under the law, employees also have some responsibilities. One responsibility is to give the employer reasonable notice, orally or in writing, prior to the employee leaving to fulfill a military commitment. Also, there is an obligation to let the employer know, within a certain timeframe, when the Guard or Reserve member has returned from military duty and is coming back to work. The amount of time in which the employee has to do this varies depending on how long their period of military duty was. Finally, the member's military service must have been under honorable conditions. If it is not, then the employer has no obligation reemploy the person. Also, the employer is not required to re-hire under conditions of impossibility (e.g. the business no longer exists) or undue hardship.

USERRA goes beyond simply covering reemployment rights of Guard and Reserve members but also pro-

*Continued on page 21*


## Convention alerts & deadlines

- Early Bird Registration - Register on or before Monday, April 2 and receive the early bird registration fee.
- 10% Airfare Discount - Alaska Airlines/Horizon is offering a 10% Airfare discount to Fairbanks during the Bar Convention. Travel between April 30 and May 7 and receive a 10% discount off any published fare (excluding promotional fares). Book your flight at www.alaskair.com and use e-certificate code ECCMA0877, or call Alaska Airlines Group and Meetings Desk at 1-800-445-4435 or your travel agent and reference ID Number CMA0877.
- Hotel reservations deadline extended to April 15! - A block of rooms has been reserved for the Alaska Bar at the Westmark Fairbanks Hotel. Rates are $75 plus 8% tax single or double. To make a reservation, please call the hotel at 907-456-7722 or call Central Reservations at 800-544-0970 or go to www.westmarkhotels.com. Be sure to state that you are with the Alaska Bar Association.

FAMILY LAW

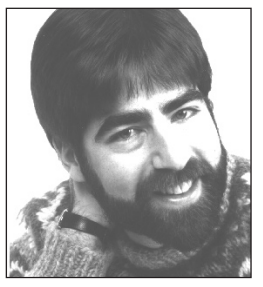
# Becoming a family law litigator

*By Steven Pradell*

Family law lawyers are litigators. There really is no choice: practitioners with formidable caseloads normally must attend a plethora of hearings, trials and other proceedings which can quickly consume a great amount of time, energy and resources.

And yet all lawyers are not necessarily litigators. There are many who have never really set foot in a courtroom: those specialized in appeals, brief writing, in house counsel, or other compartmentalized function in larger firms avoid the courtroom at all costs. Surprisingly, since many cases settle, even some experienced civil attorneys may spend years between trials. These lawyers may be reluctant to send a junior associate with no trial experience directly into the fray. Over time, an attorney who practices law for years never seeing the inside of a courtroom may develop an intense fear of the experience, and even a simple status conference may be a source of anxiety.

For those interested in family law, this poses a dilemma. How does one obtain the necessary trial training and experience to do the job? How can an attorney without trial experience convince a potential client or employer that they have what it takes to represent an emotional parent in a custody case, or successfully navigate through a complex property trial in a divorce?



**"There are steps that can be taken to learn the ropes and, hopefully, begin to be able to exercise good judgment in a courtroom."**

There are steps that can be taken to learn the ropes and, hopefully, begin to be able to exercise good judgment in a courtroom. Going to the court and observing trials is one way to overcome anxiety and become aquatinted with the process. Sitting second chair at a trial can ease the way into more complex litigation. For those already working in a law firm, expressing interest in becoming a litigator and seeking mentors who can provide feedback and oversight can be invaluable. An experienced partner who provides pointers and sits at the back of the courtroom the first time or two can help to bridge the gap between fear and actual practice.

Picking your battles is another way to initially overcome anxiety and make going to court a routine habit which is less stressful. There are areas of the law and certain courtroom procedures which are more routine and therefore easier to undergo at first. These may include a criminal misdemeanor arraignment, a traffic trial, placing a settlement on the record, an undisputed adoption, a dissolution hearing, a status or trial setting conference, approval of a minor's settlement, etc. Family law cases are judge tried, not jury trials, and having experience in a courtroom talking with a judge in a less adversarial situation can be of value. Attending CLEs where local judges speak can humanize the judge and eliminate some discomfort later. Participation in a judicial settlement conference is another way to go behind the scenes, visit a judge in chambers, and work with the system to solve problems in a less adversarial setting.

For those in firms where there simply is no trial work for an inexperienced associate, performing pro bono work is a means to quickly get your feet wet with clients who need help. Working with the Anchorage Youth Court or as a judge for such events as the Drama, Debate, and Forensics competitions held at local high schools can give another perspective to the courtroom and allow you to see a trial from the eyes of a judge, which can be beneficial in and of itself.

Finally, spending a week at a National Institute for Trial Advocacy (NITA) course can be a great way to work with professionals who can provide pointers and prepare you for future trial work. Perhaps your law firm will splurge and pay the cost. They too have something to gain from the skills you hone.



MILITARY LAW

# USERRA: Protection of civilian employment rights

***Continued from page 20***

tects them against discrimination in employment based on their military service. Just as there are laws that say an employer cannot discriminate in hiring based on race, gender, nationality, and religion, USERRA says an employee or potential employee cannot be discriminated against in employment because of their military status. For example, an employer cannot refuse to hire the person, if the member is otherwise qualified, but is in the Guard and the employer is afraid that the member might receive orders for a lengthy deployment. Similarly, an employer cannot take any action against an employee if, after initial employment, that person decides to join the Reserves or Guard. Finally, an employer cannot retaliate against an employee in any way because the employee found it necessary to file a complaint against the employer under USERRA.

**If an employee believes there has been a violation of their rights under USERRA they can report it to the Department of Labor.**

If an employee believes there has been a violation of their rights under USERRA they can report it to the Department of Labor. It is the responsibility of the U. S. Department of Labor's Veteran Employment and Training Service (VETS) to investigate and resolve complaints. If DOL is unable to resolve a complaint then the case may be referred to the Department of Justice, Office of Special Counsel, which will represent the employee in federal court at no cost to the employee. An employee also has the option to hire an attorney and file a private lawsuit. Among other remedies, double damages can be awarded if a willful denial of rights is found.

As noted earlier there is a type of military service that USERRA does not cover; namely Army or Air National Guard military service performed solely on behalf of a state mission. As stated above, Alaska Guard members "belong" to the state and look to the Governor as their Commander in Chief, unless they are put on federal orders at which time they are part of the federal military and the President becomes their Commander in Chief. Even when they "belong" to the state and are doing their weekend training or their two weeks a year, they are considered to be engaged in federal training; i.e. they are training for their federal mission and accordingly all the benefits of USERRA apply to them. The important exception to this is if they are called up on state active duty orders to perform a state mission. For example, when called up by the governor to fight forest fires, to perform duties relating to emergency relief in a natural disaster such as an earthquake, or to assist in riot control, USERRA would not protect the Guard member's job rights. However, Alaska state law does. Specifically, protections are found under A.S. 26.05.075, Reemployment Rights of the Organized Militia, which provides civil relief and A.S. 26.05.340(c) which makes it a misdemeanor to willfully deprive a member of the Guard of their employment.

The origins of the federal law go back to 1940. It has been re-written several times since then, with the most recent re-write being in 1994. In late 2004 it was amended to add a provision that requires every employer to post a notice advising employees of their rights under USERRA. (If you represent an employer who has not fulfilled this obligation, posters are available for download at: http://www.dol.gov/vets/programs/userra/USERRA_Private.pdf#Non-Federal). In January 2006, the Department of Labor finally issued detailed regulations on USERRA that run 68 pages in length.

**The length of the DOL regulations alone will advise the reader that this article is just a broad overview of USERRA and doesn't pretend to cover all aspects of the law.**

The length of the DOL regulations alone will advise the reader that this article is just a broad overview of USERRA and doesn't pretend to cover all aspects of the law. Each part of the law has many detailed exceptions and applications. Fortunately, there are many good resources out there. One of the best is the DOL website which is found at: http://www.dol.gov/vets/. Another good one is the website of Employer Support of the Guard and Reserve (ESGR), a Department of Defense entity which is akin to a booster club for business owners who employ members of the Guard and Reserve. They have a link to USERRA and sublinks to the law and regulations that are even easier to use than those in the DOL website. Their website is at: http://www.esgr.org/ .

USERRA is a law that, by and large, lays dormant between wars. However, with every war it has come to the forefront. The current war is no exception. Around the time of 9/11 it was little used, but in the years since, with large numbers of Guard and Reserve members deploying, it has come into play more and more often. As such, it is important for those of us in the legal profession to become familiar with it in order to provide the best possible advice to employees and employers alike.

*Todd Sherwood is Special Counsel, Government and External Affairs Division, Office of the Mayor, North Slope Borough. He is also a major in the Alaska Air National Guard and is the Staff Judge Advocate for the 168th Air Refueling Wing, an Air National Guard unit based at Eielson Air Force Base. He has deployed twice in support of Operation Noble Eagle. This article represents his own views and not necessarily those of the National Guard or the Department of Defense.*

TALES FROM THE INTERIOR

# No thongs, no sandals, no service

*By William Satterberg*

Fairbanks operates in cycles. Not just seasonal cycles, but social cycles, as well. So, too, does the court system hierarchy behave cyclically. I call it status-quo affective disorder, or SAD.

The court system clearly suffers from SAD. For example, at one time, the court's attitude towards decorum is laissez-faire. Yet, at other times, strict compliance is required. Unfortunately, for the attorneys who are active in the system, one can rarely, if ever, predict when the changes will take place. Sometimes, the changes are subtle. Yet other times, they are most drastic. Sometimes, the changes have a rational basis. But often, they are simply whimsical. Clearly, the local bureaucracy is bipolar. After all, the acorn doesn't fall far from the tree.

Where Fairbanks is arguably neurotic, Alaska is a bipolar state. Alaska's laws can be selective at times, even when enforced. For example, it is illegal to ride a four wheeler on the street in one of the state's major cities, such as Anchorage or Fairbanks. Yet, on the other hand, if the rider is in Fort Yukon, Rampart, or some other remote venue, four wheelers are the primary method of transportation on the city streets, even if such streets are federally designated secondary highways. And, where, as in Fairbanks, officers will stop a person in a heartbeat if they violate the law and ride their ATV on a public road, in Fort Yukon, one may very well find that the pursuing officer is riding their own, higher-powered, ATV won by the state in a forfeiture case.

**In my opinion, one of the attractions to the firm is that it does not particularly march to anybody else's drummer. Rather, the trappings of the office reflect a renegade sort of existence.**

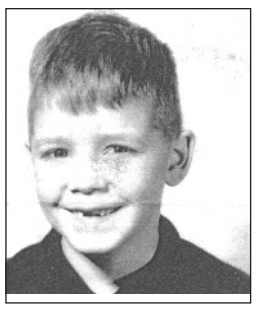
## Foundation: Flexibility

So, too, do the rules apply selectively with respect to prevailing attorney dress codes. What is the style in Galena would be laughed at in Anchorage – and vice versa. In short, "flexibility" is the mantra.

Over the years, my office has employed various legal associates. Besides hopefully increasing billable hours, associates also add spice to the practice of law. Without doubt, each associate has been a character. Each has brought along an unique makeup that has added to the evolving character of the firm. And, each has left their mark for those who follow. So, too, has it been the case with Tom Temple, aka "Mini-Me," my most recent associate.

Tom came to work from the District Attorney's Office in Barrow, Alaska. Barrow is a distinct northern outpost. Because Barrow is often ignored, Tom enjoyed almost unfettered discretion. Whether Tom fled to Barrow or was exiled to Barrow by his bureaucratic colleagues in the Department of Law may never be known. What is known, however, is that Tom and Barrow truly complemented and actually liked each other. Both are renegades of a sort. Where Fairbanks is neurotic, Barrow is arguably psychotic.

Prior to Barrow, Tom, an expert pistol and rifle shot, had spent time with the Marines where he fought in the first Iraq war. Tom was a machine-gunner. According to Tom, the worst thing about Desert Storm was his role as a machine-gunner. But, it wasn't the combat, even though Tom experienced over four dozen firefights. Rather, according to Tom, because he was a machine-gunner, he had to guard the prisoners while his comrades got to divide the loot. Once a Marine, always a Marine. *Semper Fi*.



**"Where Fairbanks is arguably neurotic, Alaska is a bipolar state."**

During a weak moment, Tom once confessed to me that the Marines found him difficult to control. At times, I also can appreciate the task. Hailing originally from Virginia, Tom possesses that certain unique characteristic of the Southerner/Northerner with an identity crisis that still is trying to figure out exactly where the Mason/Dixon line actually is. Perhaps that is why Tom was so well suited to Barrow, where he was able, after his very short tenure with the Fairbanks District Attorney's Office, to single-handedly run the office without much outside micromanaging. Tom and his supervisor at the time, Jeff O'Bryant, apparently saw things eye to eye in more ways than one.

Eventually, Tom tired of the Arctic. Having done his time with the polar bears, Tom exercised initiative and contacted me at one point when I was in search of a new associate. To my ego's delight, Tom claimed that he might be interested in working with my auspicious, boutique law firm. Personally, I concluded that Tom had to be awfully desperate. Still, we explored the options. Following the traditional employment-seeking dance that lawyers and associates do, Tom came on board and has certainly enjoyed, I hope, his time with the firm.

In my opinion, one of the attractions to the firm is that it does not particularly march to anybody else's drummer. Rather, the trappings of the office reflect a renegade sort of existence. After all, I have never been one to play very well with others. Superior Court Judge Mark Wood once put it as "a healthy disdain for the judiciary." I readily accept the opinion not as criticism, but as a genuine compliment.

## It's all about image

Similarly, one's attitude can be reflected in one's dress. As far as I am concerned, dress codes are optional. In fact, there occasionally seems to be a competition going on among the office staff for the most outlandish body piercings and tattoos. Tom, replete with his weatherbeater hat, Carhartt pants, and fondness for Conan the Barbarian, fits right in.

For over two years, Tom has successfully practiced law with the firm. To his credit, Tom has established a relatively loyal clientele and a good trial record. In fact, I have been actually embarrassed when I try to compare my trial record to Tom's, since Tom has yet to lose a case as of the time of writing this expose. On the other hand, even that, too, will end on some date. Perhaps Tom will actually choose to try a case sometime soon. To accomplish this objective, I plan to assign to Tom some real losers and see how he does.

But, back to more compelling issues of sartorial splendor. For several years, the Fairbanks legal profession has enjoyed its unique style of dress. Although three piece suits were the epitome of dress during the bygone days of Gary Vancil, who could actually make such a penguin's outfit look good, most of the other local attorneys have adopted their own inimitable dress styles.

**I plan to assign to Tom some real losers and see how he does.**

For example, for many years, Barry Jackson, a local bankruptcy attorney and, himself, an ex-Marine from the Korean War era, traditionally wore the all polyester blue suit. This uniform allowed Barry to present himself in court on a regular basis without the need to contemplate various dress styles. For a tie (when Barry chose to button his shirt and wear a tie), Barry would don a bolo string tie. Personally, I have always considered the bolo tie as an excuse for somebody who cannot tie a double Windsor knot. But, even Barry's style has changed with the times. For some unknown reason, lately Barry has altered his presence dramatically, choosing to sport an open collar shirt with his graying chest hair hanging out in scraggly tufts. I chalk it up to the forgetfulness of Barry's old age. Either that, or Barry's third childhood.

John Franich, a much younger version of Barry, but with more hair, often appears in court with his own Alaskan Bolo string tie. John also wears a trademark "Butch Wax" flattop haircut, but without the Butch Wax. John has spent years training his coiffure, claiming to have had his first flattop at the age of three. As for style, John describes himself as a "Dick Zubkus with a tie." I have always marveled on how John is able to stand all of his hair on end, especially given the fact that the only time that my hair seems to stand on end is after a hard night of partying. Most likely, it is because John has been flat topping his bean since toddlerhood. In short, it isn't that John's hair doesn't want to fall out. It is because it can't. Too much Butch Wax can have such a side effect.

Ken Covell is another self-proclaimed expert in attire. Where John and Barry actually wear suits, Ken has completely sworn off of the concept of a suit. To the contrary, Ken has been known to remark that he will never be caught dead in a suit. Apparently, Ken plans to be cremated. In fact, the closest thing that Ken comes to a suit is a relatively closely matching ensemble of a sports jacket and similarly styled dungarees. Adding to this, Ken has made it quite known among the local populace that he will not wear suits as a matter of politics.

Perhaps Ken's aversion is a throwback to the days when now Ninth Circuit Court Judge Andy Kleinfeld is rumored to have fined an attorney for not wearing a suit into the courtroom, even though the individual protested that his sport jacket/pants ensemble should qualify. Reports have it that Judge Kleinfeld announced to the individual that a suit meant exactly that--a matching set of pants and jacket, preferably gray or black in color. Judge Kleinfeld then allegedly ordered the slob to apply the fine towards acquiring a real suit. Brooks Brothers is still the court's tailor of choice, and can now be found in fine outlet malls everywhere. Even I have an old, tax-deductible Brooks Brothers suit that I was once ordered to buy.

Attorney Mike McDonald also uses the Covell approach. Mike justifies his looks by explaining that he wants his clients to feel comfortable around him. Then, again, one has to consider Mike's clientele. Mike practices bankruptcy law. Although I can certainly appreciate Mike's logic in dressing for client identification and comfort, I am declining to follow it. Orange jumpsuits are simply not my style.

Years ago, Fairbanks experienced the infamous Grober phenomenon, born of the days of Nenana attorney, Mark Grober, who, in response to Judge Gerald VanHoomisen's regular chastising of Mark for not dressing "appropriately," once wore the loudest multicolored tweed sport jacket ever spawned into the courtroom simply to prove a point. Grober look-alike Don Logan has also been reputed to dress similarly on occasion when Don chooses to dress up. Don was recently seen wearing a costume reserved only for Halloween. Dedicated to taking regular sabbaticals on his sailing boat, only Don knows how full his closet actually is.

**Fairbanks also has the publicly-appointed attorneys in the Public Defender's Office and Office of Public Advocacy, who traditionally try to bend the presentation envelope.**

Fairbanks also has the publicly-appointed attorneys in the Public Defender's Office and Office of Public Advocacy, who traditionally try to bend the presentation envelope. Such trendy styles include the Friday-only, Paul Canarsky American flag ties, the Bill Spiers Disneyland characters, and the traditional tennis shoes worn by all. Corduroy pants were once the rage with the group, but times have moved on. Dockers now seem to be the approved style. Fortunately, Lobbel boots are still quite acceptable as winter footwear.

One could imagine, therefore, the concern that arose in the Fairbanks bar when Tom Temple became the unexpected focus of the Presiding Judge's spontaneous concern regarding the informal dress code.

For some unprecedented reason, one day, the Presiding Judge unilaterally decided to raise the bar as it applied to attorney dress codes in Fairbanks. In the process, Tom became a focal point. Tom, who prefers to wear canvas pants, although not of

*Continued on page 23*

TALES FROM THE INTERIOR

# No thongs, no sandals, no service

*Continued from page 22*

the traditional khaki-brown variety, apparently drew judicial attention when he appeared in court wearing a sport jacket, a mismatched, button-down flannel shirt, an imitation Rush Limbaugh tie, and his exquisite black Carhartt pants. The ensemble was offset nicely by Tom's recently oiled, tan, hunting boots. Some say it was the Carhartts that attracted the court's attention, but I still think the Rush Limbaugh look-alike tie had a lot to do with it.

Tom's attire was not new. In fact, Tom had worn a similar outfit for all of the months that he worked with me. According to Tom, he actually prefers wearing Carhartt pants. Tom maintains that the regular pants that male attorneys often wear to court feel like "pajama bottoms." But, then again, Tom thinks most male attorneys are sissies. Not surprisingly, Tom and Tim Dooley get along rather well.

## Summoned forth

Personally, I had no objection to Tom's attire. I figured that Tom fit in to the classic Fairbanks-style, regardless. Like many others, Tom was carving his own niche. Besides, Mike McDonald also wears Dockers. And Bob Downes, when he was an attorney, reportedly did not even know what a real tie was. The Presiding Judge, however, clearly felt differently. Times were a' changing.

**I hastily thought back to the days of Pat Doogan, who always wore the same tweed sport jacket in the courtroom for years on end, yet still seemed to win difficult cases regularly.**

As such, following my cameo appearance at a hearing one day, I was unexpectedly summoned to the Presiding Judge's bench. I was joined by Assistant District Attorney Jill Dolan, ostensibly in order to avoid the appearance of an impermissible ex parte contact. Figuring, once again, that I must have invariably stepped on somebody's toes, I presented myself for the usual "dressing down." Fortunately, no longer did I fear the occasional judicial encounter session. I had been practicing law far too long for such feigned trepidation. In fact, I actually had grown to look forward to my public chat sessions with Judge Savell.

For example, I remember the time that Judge Savell actually had the audacity to fine me $200 for something I hope I didn't do. As I approached the bench and began to hand the distinguished jurist $200 in cash, he angrily ordered me to take my money back. I was confused, to say the least.

"Do you know what that looks like, Mr. Satterberg?" the court indignantly asked.

"It looks like I pay my bills on time, your honor!" came my reply. Fortunately, I was able to get two contempts for the price of one that day. Apparently, the court system was running a K-Mart special.

Over the years, Judge Savell's expressions of concern for me had eventually become sort of a "signature" thing. In fact, I actually grew to relish our regular sessions together. Unfortunately, by the time Tom came to work for me, Judge Savell had been retired to greener pastures, much like a Kentucky stud horse (The best analogy I could find.) But, despite Judge Savell's departure, judicial parenting was still quite alive and well. Yet this time, to my surprise, I was not to be engaged in a dressing-down exercise. Instead, it was to be an unexpected exercise in "dressing up."

After verifying that we were "off record," the judge commenced the discussion by pointing out that it was time that attorneys "started looking like attorneys." I panicked. A terrible thought crossed my mind. "Am I now to look like Grober?" "Or is it Logan?" I doubted if I could even find a Grober jacket if I tried. Rumor had it that the Grober garb had long since been outlawed as hazardous waste. And, dressing like Logan was simply out of the question. Becoming understandably defensive, I asked what the concern was with the outfit that I was wearing. After all, I had showered the day before. My shirt was clean and my fly was zipped. Moreover, my JC Penney sport coat was not particularly that tattered, although, admittedly there were some polyester "pills" beginning to appear in the armpits. But, sport coats are durable. It is a well known fact that sport coats can last a long time. I hastily thought back to the days of Pat Doogan, who always wore the same tweed sport jacket in the courtroom for years on end, yet still seemed to win difficult cases regularly. When Pat retired, I suspect his sport jacket was also retired to some lawyer's museum.

"Is there something wrong with my appearance?" I questioned as I subjectively thought, "or is the court simply taking another poll?"

In response to my query, I was told that the judge actually wished that more attorneys dressed like myself. Surprised, I took the compliment handily. I was happy that the court had forgotten that I had once appeared in district court with my fly unzipped during my opening statement. Perhaps, I hadn't made that big of an impression at that time, after all. Apparently, none of my openings are that memorable.

The court then bluntly pointed out that "Tom Temple" clearly needed to alter his dress style. "Carhartts" were "not appropriate attorney dress in the courtroom." Besides, my clients were paying good money (an unsubstantiated assumption, I might add, regarding revenues received versus revenues billed) and deserved to have attorneys who "dressed well."

The discussion complete, I assured the court that I would tactfully pass on the concerns to Tom, which I delicately did.

"Tom," I sensitively stated, "The court thinks you dress like a slob."

To my surprise, this disclosure immediately launched a flurry of legal research by Tom which I have seldom seen before into Tom's inalienable constitutional rights of being able to dress as he wanted. Prior to that time, I doubted if Tom had much interest in the law library, wherever it is now located. In fact, only once since, when the District Attorney balked at returning one of Tom's shotguns seized under a questionable search of his remote cabin for some cut-up human body parts, did Tom ever launch himself so passionately into applied legal research.

Later, I was relieved somewhat when I learned that the court's criticisms were not leveled only at Tom. Apparently, at a local bar lunch, the announcement was made that female attorneys should no longer appear in the courtroom "wearing beachwear." I obviously missed that announcement and, even more disappointingly, its factual basis. After all, I have always been one who prefers to draw my conclusions based upon my own powers of direct observation. I would have liked to have witnessed the claimed transgression first hand. Objectively speaking, of course. (Personally, I have never had any objection to any attorneys who want to wear beachwear into the courtroom. In fact, I think that such attire might do much to enhance the practice of law in Fairbanks. I might even wear my Speedos some day.)

**(Personally, I have never had any objection to any attorneys who want to wear beachwear into the courtroom. In fact, I think that such attire might do much to enhance the practice of law in Fairbanks. I might even wear my Speedos some day.)**

When I tried to explore the beachwear banter further with my brethren of the bar, it was pointed out to me that the issue concerned alleged "thongs." Obviously, thongs were a different song. Reluctantly, I tended to agree. Thongs do not necessarily protect the feet that well. Furthermore, unless the person paints their toenails religiously, thongs are not even that attractive, even if they are arguably beachwear. Besides, Lobbel booties are more appropriate for Fairbanks winters. In short, thongs should be banned.

## 2005 clothing strike!

Thus began the unsanctioned Fairbanks attorneys clothing strike of 2005. Whether conceived out of a directive either from higher powers or out of judicial ennui, the challenge had been made. Predictably, the challenge was accepted. True to form, the local Tanana Valley bar, in its legendary style, would respond in its own subtle fashion. Throughout the local legal community, plans were secretly laid.

**Thus began the unsanctioned Fairbanks attorneys clothing strike of 2005.**

Meanwhile, Tom continued his extensive research into his constitutional rights of dress, often working late into the evenings, well past 4 p.m. In time, Tom located some obscure cases that suggested that a declaratory judgment action might exist to establish the degree of courtroom decorum required. Yet, Tom was not alone in his crusade. Where Tom delved into creative research, other, more aggressive, antisocial attorneys adopted a different approach. Statement ties began to appear more often than just on Fridays. The Paul Canarsky American flag tie soon found company in numerous other expressive logos. Tension built. One could almost hear the elastic snap. Peter Max was being resurrected. Assistant district attorney Helen Hickmon, also a Barrow veteran, once startled the courtroom by rushing in late to her counsel table while wearing a revealing pair of blue, full length insulated nylon coveralls with a matching knit stocking cap, certainly a far cry from "beachwear" – except perhaps for Barrow.

The best appearance in the courtroom, however, was still reserved for Fairbanks patriarch, Fred Brown (the older), who materialized one day in Judge Winston Burbank's courtroom shortly after the Temple escapade, wearing what can be best described by a colorful e-mail exchanged on August 16, 2005, on the state computer system, between 32 certain consenting assistant district attorneys and support staff as follows:

**"Subject: FW: courtroom attire**

**In light of the court system's new found concern over attorney attire I feel compelled to share the latest and greatest dress code violation…..I was in Burbank's extremely crowded courtroom this morning when I heard Fred Brown's familiar voice state that he was present for the "call of the calendar." I then heard laughter followed by Tom Temple loudly stating "holy crap, and I get in trouble for Carhartts?" As I looked over I observed that Freddy was wearing VERY short jean shorts, a striped button down and bow tie with a tweed blazer, suspenders (to hold up his Daisy Duke's naturally) a top hat, black knee socks and wing-tipped shoes. Needless to say the outfit was a bit distracting causing Burbank to forget what the defendant's name was and the in court clerk to ask that the future court dates be repeated three times. His client was justifiably mortified and wouldn't even stand next to him."**

Although the outer limits of style have yet to be reached, it is hoped that, with time, this local judicial crisis, as well, will subside. If so, perhaps, the next focus will be on jewelry worn in the courtroom. Judicial scrutiny may be drawn to the permissible number of rings, earrings, tongue studs, nose studs, eyebrow studs, or just plain other studs which are acceptable. Maybe then, I will get the attention I so truly deserve.

Admittedly, the battle could wage on for years, ebbing and flowing like the tide in the Chena River. Tragically, given the relentless march of time, the uniqueness of the local bar of Fairbanks likely will succumb to the outside pressures of wanting to be like the big city attorneys of Anchorage. Some defeatists say it is inevitable. Like John Henry battling the steam engine. Or like me taking years to be potty-trained, yet still not taking out the garbage or picking up my underwear from the bedroom floor. Regardless, the good fight must be fought, as long as there are gallant others like Helen, Tom and Fred willing to carry on the battle.

And, not unlike the long hair battles of my junior high school days, maybe the courageous protestors will ultimately prevail. Until then, however, the unofficial Fairbanks courthouse motto will be: "No thongs. No sandals. No service."

ABA Section FOCUS:

# Alternative Dispute Resolution

## Special ADR Section introduction

*Continued from page 1*

in mediation, and I'm lucky enough to teach some of them. In Fairbanks, North Star Youth Court offers peer mediation, parent-teen mediation, and victim-offender mediation. As Anchorage and other communities grapple with gang violence and other crime, community-based mediation may become part of the response. The Alaska Human Rights Commission offers mediation to resolve disputes pending before it.

This edition of the *Bar Rag* contains many articles about ADR. Dispute Resolution Coordinator *Karen Largent* surveys the Alaska Court System's court-connected mediation programs. Retired Judge *Elaine Andrews* and *Judge Herb Ross* write about the Appellate Settlement Program.

*Ryan Roley & Joan Clover* offer some practical advice to family practitioners. *Linda O'Bannon* writes about mediation of employment disputes. *Mary Southard* writes about the Alaska Human Rights Commission's mediation program. *Tom Owens* writes about his personal experience in transforming his practice from one that emphasized litigation to one that emphasizes conflict resolution. *Stuart Goering* offers tips on making your practice ADR-friendly.

Over the past 20 years, Alaska's bar has become more willing to use a broad array of tools to serve our clients. Yes, waging legal war often remains necessary, but more often we better serve our clients by exploring available alternatives. Our role as "counselors at law" is better defined now than it used to be.

We are learning that mediation isn't a threat to our lawyerly livelihoods. Mediation and other forms of ADR offer more tools for serving our clients' needs. And satisfied clients are good for our bottom lines too.

Enjoy the articles, and think about how you can use mediation and other forms of ADR to serve your clients and grow your practice.

*Glenn Cravez helped establish and chairs the Alaska Bar Association's ADR Section.*

## Mediation realities for the family law lawyer

***By Ryan Roley with contribution from Joan Clover***

It's 1984 at Willamette University in Salem, Oregon. I'm a first-year law student. In addition to the obligatory courses that baptize all L-1s, this well-respected law school's first-year curriculum includes an Introduction to ADR (or some such title). I think to myself, "ADR -- What's that?" Alternative dispute resolution, I learn. That's not much help.

I'm a 22 year-old Poli Sci/History graduate from across the street. I don't know mediation from meditation. I have heard of arbitration, but I'm not sure what that really is, either. Turns out this course is the flagship of the graduate school's brand new Center for Dispute Resolution; the first adjunct school of its kind on the west coast, I later learn.

Fast-forward three years to 1987. Through completion of a core selection of specialty courses, my JD degree includes a new Certificate of Dispute Resolution. More to the point, I've received a thorough schooling through formal courses, workshops and research projects, in the techniques familiar to trained ADR practitioners. This schooling heavily influences both my view of the law as a profession and my decision to practice family law.

The family law firm of Gruenberg and Clover brings me in. I cut my teeth in family law.

Concurrently, I join ADSA (Alaska Dispute Settlement Association) and the ADR Section of the Bar, receive specialized training to mediate visitation disputes through the Alaska Judicial Counsel's Visitation Mediation Pilot Project, perform volunteer victim-offender mediation, and later join the Academy of Family Mediators.

Years pass. Now approaching two decades of dictating "COMES NOW ..." (you know the rest), has life in the trenches cruelly jaded my earlier naive notions? Not entirely.

Certain truths sustain the practice of family law. These truths meet the optimism of ADR and form a reality revealed through experience and common sense. What has this experience revealed?

**Certain truths sustain the practice of family law. These truths meet the optimism of ADR and form a reality revealed through experience and common sense.**

### 1. ADR favors the prepared attorney.

Sorry, but that settlement conference you've agreed to try in six weeks (or six days) doesn't reduce those mundane, rudimentary tasks that frame "zealous advocacy." But you already know that. Same goes for "formal" mediation. Whether it's providing the superior 90.1 property table that becomes the working template to derive an "equitable" (meaning more equitable for your client than for the hapless sap on the other side) division, or the practiced "show and tell" with the HP10B calculator to point out the disparate future income of the other spouse's superior income, or, heaven forbid, providing a sound legal/factual analysis for your client's desire to have the dependency exemptions of the kids post-divorce, your role of persuader includes showing the merit of your client's demands.

Structure your opening positions, intermediate positions and bottom line "trip-wires." "Wing it" at your own, and your client's, risk.

### 2. ADR rewards the prepared client.

I know, I know. The same is true for trial. In ADR, however, what you prepare your client for differs, greatly so. For example, generally ADR, especially mediation, amplifies the impact of the strengths and weaknesses of the client visa vie the other party. If your client has been the "follower" during the marriage, he/she will likely "cave" on an early issue, either to set a "positive tone" or in the thought that the other side will "return the favor" on a subsequent issue. Instead, an unearned, early concession typically emboldens the "tank" in the other room to dig in. The result: either a failed mediation or, worse, an inequitable result ripe for buyer's remorse. You need to know your client's personality and prepare him/her accordingly for the ADR method and process you've selected.

As with representing the non-mediating client, however, you remain the mediating client's guide and interpreter of the governing law. Before entering a mediation or settlement conference, explain to the client the legal "norms" established by statute and civil rules that set substantive parameters for the ADR effort.

This preparation will quiet misconceptions a client may have that can sabotage a mediation or settlement conference: that my pension is mine because "I earned it"; that the value of my pension is the sum of contributions I or my employer has made into the pension; that property is always divided 50-50; that there's no such thing as post-decree spousal support in Alaska; that my affluent lifestyle during the marriage will have to continue after the marriage; that "no child support" applies if I get 50-50 custody of our kids.

**A word of caution to the purely "left-brain", purely law/fact-driven attorneys: the information given to the client about the law is only that – information.**

A word of caution to the purely "left-brain", purely law/fact-driven attorneys: the information given to the client about the law is only that –information.How helpful that information is to the client depends greatly on the personality of the client. For the holistic, "new age" attorneys out there: creative suggestions are only that –suggestions. Helping the client think outside the box is usually necessary, including discussing the other parties' underlying interests and motivations. In mediation, as in other formats, however, your client may misconstrue this effort by you as "weakness" or that you do not "believe" in him/her. The client also needs to that know such effort is typical of a practiced ADR practitioner. Knowing this going in preempts the suspicion that "the mediator's on their side."

### 3. Agreements through ADR are formed emotionally and then defended with logic.

What does THAT mean? Simple: fear of loss, greed of gain, guilt of conscience, victim-hood, and other emotion-based influences prejudice each client's decision to hold, fold or compromise. However, since the ability of the human mind to rationalize is infinite, and necessary, a reason for the emotion-based decision will form and justify each decision.

For the attorney, this means knowing the law often pales compared to the skill of perceiving the emotional default of your client and, if possible, exploiting that of the other party. "Psychobabble," you may be thinking. Ask yourself what emotions led you to buy that vehicle or that suit that the salesperson helped you with but that you really didn't need? It's often the same in mediation.

This reality also means checking, or at least perceiving, your own emotional reactions and prejudices. Your emotional tone will influence both your client and the other side, either for good or ill. It will also define you as either an alley or hindrance in the eyes of the mediator/settlement judge.

### 4. The skillful question can be more influential than the artful answer.

Lawyers argue for a living. Arguing is typically the skill for which we are hired and the task that consumes most of our professional energy. It is this innate talent for it that told our mothers we should go to law school. Little wonder we default to this tool, even in negotiation, settlement conferences and mediation. If ADR presents arenas for emotion-based persuasion, then skillful questions help to achieve successful results.

How? Ask your client what he/she *really* wants and *why* (also called her "underlying interest"). During negotiations, pose questions to the other side that reveal the same of the other side. It is surprising what the other side will reveal when asked. Most people will disclose information despite their better judgment, because most people want to be "understood." Skillfully crafted questions can steer the negotiation to a favorable issue. A well-timed "re-direction" question can also steer a negotiation from impending impasse.

### 5. Fatigue can lead to failure.

You either have endured or will endure a marathon, "after-hours" settlement conference or mediation of a complex or multi-layered case. Let's face it -- we're human, and so are our

*Continued on page 25*

ALTERNATIVE DISPUTE RESOLUTION

# The growing use of court-connected mediation programs

*By Karen Largent*

Over the past decade Alaska courts have increasingly referred cases to mediation, mirroring a national trend. Mediation works, and judges are interested in good solutions. Court-connected mediation programs have grown from one program in one court 10 years ago, to 4 programs available in numerous courts throughout the state today.

**Mediation works, and judges are interested in good solutions.**

Mediation is a resource for attorneys to help you settle your clients' cases. Self-determined decision-making leads to outcomes everyone can live with – and even feel good about. In addition to high agreement rates (about 85% of mediations resolve some or all of the issues raised in mediation) these mediations also result in high levels of participant satisfaction, as reported on written surveys returned to the court system's Dispute Resolution Coordinator.

Court-connected projects offer mediation in domestic relations cases involving child custody disputes, in child in need of aid cases, as well as in guardianship and conservatorship cases. In addition to these 3 programs which contract for services with specially trained private mediators, mediators also volunteer their services in the Anchorage and Fairbanks courts to help parties resolve their small claims disputes.

The Child Custody and Visitation Mediation Program, in its 10th year of funding by a recurring federal grant, assists parents in private and confidential resolution of their disagreements about custody, visitation, and other co-parenting concerns. Most parents with combined net incomes under $75,000 are eligible. Mediators are located in many communities, and when in-person mediation cannot be provided, telephonic mediation may be an option.

The Child in Need of Aid Mediation and Family Group Conferencing Program, available throughout the state, has helped resolve a vast array of concerns related to placement, visitation, case plans, and permanency plans in hundreds of cases over the past 7 years. In 2005 this program was selected by the Association of Family and Conciliation Courts (AFCC) Court Services Task Force for recognition as an "Exemplary Court Program and Practice". Initially funded by federal grants, this program is now funded by the legislature as part of the court system budget.

The Adult Guardianship and Conservatorship Mediation Program, in its second year of a 5-year pilot project funded by the Alaska Mental Health Trust Authority, is currently offered through several 3rd Judicial District courts. Expanding to other interested court locations throughout the state in July 2007, it has been very successful in engaging vulnerable adults and their support systems in creating meaningful plans that meet real needs, assuring the voice and wishes of the adult are heard and reflected in decision-making. Mediation often results in guardianship or conservatorship being avoided in favor of better alternatives.

**Mediation often results in guardianship or conservatorship being avoided in favor of better alternatives.**

Mediation works – judges like it – participants are satisfied – and it's free! These mediation programs are offered at no cost to the participants with the exception that the Child Custody and Visitation Mediation Program requires a one-time co-payment of $50 from each parent. Ask for mediation in your next case – you may be glad you did!

*The author is the court system Dispute Resolution Coordinator. The courts' mediation web site is at: www.state.ak.us/courts/mediation.htm.*

# Mediation realities

*Continued from page 24*

clients; so is the ADR practitioner. I have no solution, only caution born of experience. Mental fatigue easily leads to mistakes and missed opportunities, as well as to either the "let's just settle" or "let's just quit" mentality in the client. A food break is a VERY good idea. One experienced domestic relations attorney "treated" all sides (and the mediator) to fast food during one such marathon mediation. The break and needed energy helped the effort. The unspoken message that "we're all in this together" wasn't missed, either.

### 6. Avoid majoring in the minors.

In other words, help your client, or sometimes the other side, focus on issues of consequence. At least identify "big" issues from "small" issues, both prior to and during the process. ADR formats, if not controlled, suffer from distraction syndrome. Venting has a place in the search for compromise, but should not steer the ship.

The more important the disputed issue, the more "evidence" and effort is likely needed to gain a workable, or better yet favorable, result.

### 7. Identify and remind both yourself and your client why you chose to mediate.

Typical motives for mediation include the following: *Closure*: Adjudicated domestic relations cases are known for going on and on with terrible controversy and expense…long after a judge has rendered a "final" order or decree. *Relationship*: Domestic relations parties often have to continue to associate with each other long after the attorney's bill is paid (or ignored).Mediation, with its emphasis on communication and compromise, can instill a model for future interaction. *Ownership*: It's your life, Mr. Smith. Would you prefer to have a say in how you lead it after the divorce?" *Certainty*: Remind the "second guessing" client about the "realities" of the legal system, i.e. judge's best intentions versus incorrect understanding; judge's personal biases; judge's fatigue and overwhelming case-loads; admissibility issues; vagaries of third-party witnesses; putting your private life "on-the-record"; time-lag for a decision; problems with enforcement; possibility of appeal; difficulty of litigation on children; cost.

**Remind the "second guessing" client about the "realities" of the legal system.**

### 8. Be mindful of when not to use ADR:

Does the case present a history of domestic violence or other less obvious source of significant psychological imbalance to your client's disfavor? Are you objectively convinced the opposing attorney's suggestion to mediate or try a settlement conference is a ploy for "back-door" discovery? Is the mediator/conference judge a "bad fit" for your case? Are you confident trial will provide a substantively superior result?

The "reality" is that attorneys, both new and seasoned, can "keep the faith" in ADR. Successful use of ADR, however, demands the skills of our profession, as well as skills typically considered "non-legal," but which are valuable none the less.

# TOP REASONS
## to attend the Bar's annual convention

*Returning from the bar convention a few years ago, a senior attorney who had attended as an invited CLE panel member was overheard saying to another on the airplane, "I've never gone to a convention in all these years. I should have...I will in the future." What have you been missing?*

- Get together with colleagues you haven't seen in awhile.
- Get ALL your CLE credits (and dues discount) in one fell swoop.
- Actually avail yourself of convivial conversation with fellow lawyers you only see in passing at the courthouse in between your jammed schedule.
- The perfect excuse for turning off your cell phone.
- Rub elbows with the bench.
- Learn thought-provoking and fascinating information you didn't even know you needed to know.
- Pick the brains of experts the Alaska Bar Association has brought to Alaska.
- Attach a face and a voice to that attorney you've dealt with only by phone, fax or e-mail.
- Catch up on all the latest gossip.
- Did we mention social events?
- Meet people in the exhibits area whose products & services will help your practice.
- Win a door prize.
- Don't believe rumors. See Fairbanks and the TVBA first hand, as they really are.
- Think of it as a mini-vacation, for fun and intellectual profit.
- Go early, stay late, escape with a few local diversions:

**David Sedaris LIVE in Concert**

**May 1, 2007, 8 pm, Herring Auditorium**

**Fairbanks 7th Annual Alaska Visitor Industry's Walk for Charity** May 4, 2007. 5 p.m. Raise money for local charities as you feast on fabulous food on this fun 3K graze through downtown Fairbanks.

**Chena River Run May 5**.. First five-kilometer run of the season. This event is sponsored by the Rotary Club of Fairbanks to benefit local community service projects.

ALTERNATIVE DISPUTE RESOLUTION

# APPELLATE MEDIATION: It's never too late

*By Herb Ross* [1]

On the surface, appellate mediation does not seem to make sense. Why would a party who has won at the trial level give much consideration to negotiating and settling with the losing side? Nonetheless, almost all appellate courts feel there is merit in having an appellate mediation program since all 13 federal circuits[2] and a majority of the highest state courts have programs to explore settlement at an early stage in the appellate process – generally, before the briefing.

The rationale of appellate mediation programs is "to help parties communicate with one another, clarify their understanding of underlying interests and concerns, identify the strengths and weaknesses of legal positions, explore the consequences of not settling, and generate settlement options. An underlying assumption is that lawyers are frequently reticent about initiating settlement negotiations."[3] Mediation can be used to develop creative solutions outside the legal box of the particular question presented to the appellate court. For example, resolving other litigations involving the same parties or reaching a solution that makes better business sense than a pyrrhic legal victory. And, since appellate judges are only minimally involved with the mediation process, it frees them to devote time to cases in which appellate decisions will be required.[4]

Appellate cases reach negotiated settlements for many reasons, for example: the winning party realizes the trial judge was possibly mistaken in ruling for them, the unrecoverable cost and delay of an appeal (even if the decision is sustained) justify compromise, the law is unsettled and there is a chance of reversal, the possibility of remand and having to litigate all over at the trial level, the parties are weary from the fight, or, the parties are able to reach a compromise which makes more business sense than enforcement of their strict legal rights.

In Alaska, the appellate mediation or settlement program has been active since 2003. It started after the Alaska Supreme Court adopted Alaska Appellate Rules 221 [5] and 222. [6] Appellate Rule 221 requires the attorneys for parties to an appeal, soon after it is filed, to discuss the possibility of a prompt settlement of all or part of the appeal. Rule 222 provides some procedural structure for appellate settlement conferences in civil cases. The conferences can be set on the motion of a party or the supreme court's own motion. The court may appoint a retired judge or justice, an active judge, or a private neutral. If a private neutral is appointed, the costs are borne equally by the parties, unless they or the court orders a different apportionment. Otherwise, appellate mediation is a free service of the court system.

Rule 222 also provides that the settlement conferences will be confidential. There is a simple description of the timing of the conduct of conferences and the end of the mediation if either the neutral or a party feels further mediation would be fruitless. The idea is that there is no court sanctioned pressure to settle if a party does not want to settle. The procedure insulates the justices from the mediation process, and the justices should never learn about any parties' conduct, statements or positions during a mediation if the case does not settle as a result of the appellate mediation. The only information the justices should receive is that the case did not settle, without any embellishment as to why it did not.

The appellate mediation program in Alaska is supervised by retired superior court judge Elaine Andrews. Judge Andrews screens all appeals to the supreme court to choose those she feels might benefit from mediation. The intake forms for appeals provide her with information about whether the parties have previously attempted to mediate or settle the case with the assistance of a third party neutral.

When she sees a likely candidate, Judge Andrews calls the attorneys

*Continued on page 27*

# Mediation program at the Alaska State Commission for Human Rights

*By Mary Southard*

Do you have a client that is a party to a discrimination complaint filed with the Alaska State Commission for Human Rights? If so, the state agency's mediation program may be able to help your client reach a voluntary settlement without an investigation.

The commission enforces the Alaska Human Rights Law, AS 18.80.010 et seq., which makes it unlawful to discriminate in employment, public accommodation, housing, financing and state and political subdivision practices because of race , religion, color, national origin, sex, physical/mental disability, and in some instances because of age, marital status, changes in marital status, pregnancy and parenthood.

The commission conducts impartial investigations of complaints alleging violations of this law. Its investigators interview witnesses, review relevant documents and make written determinations as to whether there is substantial evidence to support the discrimination claim.

As an alternative to investigation, the commission has a voluntary mediation program. It offers two types of mediation - in person mediation at its Anchorage office and telephone mediation for parties who are willing to pay for the cost of the telephone call. The mediator's services are free. Since its inception in 1998, the mediation program's overall settlement rate is 72% with settlements exceeding $1.7 million to date.

After a discrimination complaint has been filed with the commission, the mediation program offers parties in appropriate cases the opportunity to resolve the complaint through mediation rather than investigation. The program is completely voluntary - a mediation is held only if both parties agree to it. If one party declines to mediate or if the mediation does not result in a settlement, the complaint will be investigated by the commission.

Mediation allows parties an opportunity to reach a mutually acceptable settlement which results in the dismissal of the discrimination complaint. Parties discuss their individual perspectives regarding the circumstances in the complaint, propose possible solutions and work with the mediator to seek a resolution agreeable to both parties. If any public policy issues arise during the mediation, such issues must be addressed in the settlement.

Mediations can be accomplished through a joint session where the parties discuss settlement proposals with each other and/or can be reached through private caucuses where each party meets separately with the mediator to explore settlement options. Each party may bring one additional person to the mediation; it can be an attorney, family member, friend, or other support person. Unrepresented parties are informed that they may consult with an attorney prior to signing any proposed settlement agreement.

An additional advantage to mediation is that it can be scheduled quickly, as soon as both parties have agreed to participate in the mediation conference. It may also improve communication between parties who have an ongoing relationship, such as employees and employers or landlords and tenants.

Mediations are not fact-finding conferences; the goal is to try to resolve the complaint. All discussions during the mediation conference are confidential to encourage good faith negotiations and successful settlements. Information from the mediation is protected from disclosure to commission investigators. All persons who attend the mediation - whether a party, attorney, support person or mediator - must sign an agreement to keep such discussions confidential.

Mediated settlements can be a creative opportunity to tailor an agreement to meet the specific needs of the individual parties and can include monetary as well as nonmonetary relief e.g. job, anti-discrimination training, references, policy development, reasonable accommodations. Occasionally parties do not wish to mediate but still want to explore settlement. The mediation program also facilitates predetermination settlements in such cases.

Based on confidential mediation program surveys, most commission participants are pleased to be offered the opportunity to mediate a complaint whether or not they select this option and those who mediate are satisfied with the mediation process and would recommend mediation to others whether or nor settlement is reached. If you have questions or would like more information regarding the commission's mediation program, please contact mediator Mary Southard at 274-4692, extension 247 or TTY/TDD 276-3177.

*The author is a mediator with the Alaska State Commission for Human Rights.*

# APPELLATE MEDIATION: It's never too late

*Continued from page 26*

involved individually to feel them out about the possibility of mediation. Those parties who react favorable are placed in the process to set up a mediation or settlement conference. If one of the parties bulks at mediation, no pressure has been put on them to participate in the program. Although parties who do not want to mediate might be mandated to participate, it has not been Judge Andrews' practice to force mediation on them. If the parties themselves request mediation, they are always given the opportunity.

The appellate rule calls for the mediator to be a judge or retired judge. The appellate mediation in Alaska through the court's program have to date been conducted by retired superior court judges, Elaine Andrews and Dan Hensley, and myself, Herb Ross, a semi-retired bankruptcy judge. The practice has been to ask the parties to provide the mediator with a brief pre-mediation statement, summarizing the facts, procedures, legal and factual issues on appeal, settlement offers, and likely ways the matter might be settled.

The mediator generally has the lower court record to study. I usually spend several hours reviewing the trial court record and making copies of key pleadings (the complaint, the answer, summary judgment motions, the lower court's ruling, and the points on appeal).

Once I have a grounding in the factual and legal positions of the parties, I independently research the key legal issues. I have found that if I go into an appellate mediation without a deep understanding of the facts and law from each parties' perspective and from my own research, I do not have nearly as much success as a mediator.

At the mediation, the parties and their attorneys appear (sometimes by phone). The mediation is often held in a conference room at the supreme court in Anchorage, but conferences have been held in Fairbanks and Juneau as well. Each mediator has her or his own style, but typically for the ones I have done, I start with an introduction by me as the mediator, and a request that the parties invest some time to see if the matter can be resolved. I generally have each party or their attorney make an opening statement about their view of the case. Since the communications are confidential, I encourage candor by each party.

**I have found that if I go into an appellate mediation without a deep understanding of the facts and law from each parties' perspective and from my own research, I do not have nearly as much success as a mediator.**

Sometimes, notwithstanding the fact that the case is on appeal, it is actually the first time a party has had a chance to tell his or her side of the story as they see it. It is a powerful thing to let them get the pent up frustration off their chests. Nonetheless, I never try to do this if their attorney resists or objects; I will try to get the attorney to take a less litigious and more facilitative approach while under the confidentiality protections of mediation. It is, after all, the client's case and most attorneys welcome the opportunity to approach the dispute from a less adversarial posture.

After some time in joint session, I generally conduct separate sessions or caucuses with each party to explore settlement offers. Judge Andrews' style is to use caucuses almost exclusively, and she is very talented and successful in her approach. One of the key reasons for the success of the Alaska appellate mediation program – settling over 50% of cases mediated – is the respect appellate attorneys in Alaska have for Judge Andrews' fairness and judgment.

It may be that a mediation session will be continued to allow more information to be developed by the parties, to have experts look at the effect of a proposal, or just to get over a temporary impasse.

During the mediation process, the parties may request a stay of briefing and/or the preparation to the record, which is generally granted if unopposed. One of the benefits of mediation is to avoid the expense of briefing and preparation. Another benefit is easing the burden of the court by resolving as early as possible those cases which can settle before they impact the workload of the justices, their law clerks and staff. And, a negotiated settlement at an early stage of the appeal generally lifts an enormous financial and emotional burden from the parties (who might still be facing years of appeals and litigation if the case is remanded).

The statistics for Alaska Supreme Court's appellate mediation program are impressive. Over 50% of the cases mediated reach settlement. I believe the average for most federal programs is in the neighborhood of 25% - 35%. It has been my privilege to participate in the Alaska appellate mediation program. From a personal perspective, I volunteer my time as an appellate mediator not principally to ease the work load of the supreme court, but to offer parties a way to resolve their disputes sooner, shortcutting the great emotional and financial costs of formal litigation.

**Footnotes**

[1]The opinions in this article are those of the author, and not necessarily those of the Supreme Court of the State of Alaska or the Alaska Court System, neither of which has authorized him to speak on their behalf.

[2]Appellate mediation in the federal circuit courts is authorized by Rule 33 of the Federal Rules of Appellate Procedure: The court may direct the attorneys—and, when appropriate, the parties—to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement. A judge or other person designated by the court may preside over the conference, which may be conducted in person or by telephone. Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case. The court may, as a result of the conference, enter an order controlling the course of the proceedings or implementing any settlement agreement.

[3]*Mediation & Conference Programs in the Federal Courts of Appeals: a sourcebook for judges and lawyers* (Second Edition, Federal Judicial Center 2006), page 5.

[4]*Id.* For an excellent and practical description of an appellate mediation program by the director of the Third Circuit Court of Appeal's program, see, *Appellate Mediation in the Third Circuit* – Program Operations: Nuts, Bolts and Practice Tips, Joseph A. Torregrossa, 47 Villanova Law Review 1059 (2002).

[5]Rule 221. Settlement Discussions in Civil Appeals. The attorneys for all parties to a civil appeal to the supreme court shall discuss the possibilities for prompt settlement of all or part of the appeal. This discussion must occur by the date specified in the opening notice issued by the clerk of the appellate courts. The discussion may be conducted by telephone. If the parties reach settlement on any issue on appeal, they shall immediately file an appropriate notice with the clerk of the appellate courts. Otherwise, they shall file a certificate signed by all attorneys that the attorneys, with the knowledge of their clients, have discussed settlement as required by this rule. A settlement discussion is not required in a case in which a party is appearing pro se or in a case that is exempted by the court.

[6] Rule 222. Settlement Conferences in Civil Appeals.

(a) Motion for Settlement Conference. At any time after a notice of appeal is filed, a party may file a motion with the court requesting a settlement conference. The court may order the parties to participate in a settlement conference in response to such a motion, or on its own motion.

(b) Settlement Officers. The court may appoint a retired justice or judge, an active judge, or a private neutral to serve as the settlement officer. If the court appoints a private neutral, costs will be borne equally by the parties unless the parties otherwise agree or the court orders costs to be apportioned differently.

(c) Confidentiality. Settlement conferences will be held in private and are confidential. The settlement officer may report required attendance but shall not otherwise disclose or testify as to any aspect of the conference. The settlement officer shall not participate in subsequent judicial decisions related to the case, unless the parties have waived this disqualification. All conferences, submissions, and statements made in the course of the settlement proceedings required by this rule constitute offers to compromise and statements made in compromise negotiations and are inadmissible pursuant to Evidence Rule 408. This rule does not relieve any person of a duty imposed by statute.

(d) Conduct of the Conference.

(1) Conferences. The settlement conference will be conducted informally at a location designated by the settlement officer. The parties shall not submit settlement briefs unless requested to do so by the settlement officer. If briefs are requested, they must be submitted directly to the settlement officer, who will return them to the parties who submitted them at the conclusion of the settlement proceedings. A party's brief may not be disclosed to anyone, including any other party, without the submitting party's consent and will not be available to the court. Counsel for a party may attend all conferences attended by that party.

(2) Termination. After the initial joint conference and the first round of any separate conferences, a party may withdraw from the settlement proceedings, or the settlement officer may terminate the process if the officer determines that settlement efforts are likely to be unsuccessful. Upon withdrawal by a party or termination by the settlement officer, the settlement officer shall notify the court that settlement proceedings have been terminated.

(e) Postponement of Briefing and Preparation of the Record. Settlement proceedings under this rule will not delay preparation of the record, briefing, or excerpts, except by order of the court.

(f) Results. If the appeal is resolved or partially resolved as a result of the settlement conference, the parties shall seek an order of dismissal under Appellate Rule 511 as to all or part of the appeal. The parties shall take this action within fifteen days after the settlement proceedings have concluded.

## Hey, I won, why should I settle now? An Overview of Alaska's Appellate Settlement Program

*By Elaine Andrews*

The Alaska Supreme Court has created an Appellate Settlement Program to help parties settle cases that have been filed with the Alaska Supreme Court. Although attorneys are well aware of the opportunities and advantages of settlement before filing suit, or before trial is commenced, they often do not consider the benefits of settlement after an appeal is filed. Through the Appellate Settlement Program the Supreme Court has expedited the resolution of disputes, reduced the cost of litigation, and brought finality to the proceedings.

On July 1, 2003, the Appellate Settlement Program began in earnest. All Supreme Court appeals filed after that date have been screened to determine if they have settlement potential. Petitions for Review are not screened. Retired Superior Court Judge Elaine Andrews has been appointed as the Chief Mediator and conducts most of the initial screenings. Retired Bankruptcy Judge Herb Ross and Retired Superior Court Judge Dan Hensley have been active and successful mediators in the program.

From July 1, 2003 through 2006 approximately 520 cases have been reviewed. Close to 100 have been selected for mediation and approximately half of those selected for mediation have settled.

Many cases are initially rejected as inappropriate for mediation as they concern important issues of public policy, or involve litigants or issues that resist effective mediation efforts. Some cases appear to have potential but the judicial screener needs further information from the parties. The screening judicial officer contacts the attorneys or pro se litigants and the possibility of mediation is explored with each side. Of the 520 cases that have been screened, counsel have been contacted on well over half of those cases to determine if mediation might be of value. If the screener finds settlement potential after these candid discussions which are conducted on a confidential and ex parte basis, the case is set for mediation.

Mediation is generally held in person in Anchorage. On occasion, cases have settled with telephonic mediation (One memorable case settled with satellite phone mediation from a remote location in Kodiak!) From time to time, the mediator has traveled to Fairbanks or Juneau to settle a case.

On occasion the parties will request a settlement or mediation conference prior to screening. Those requests are encouraged and honored. The goal is to reach an early settlement, before transcript preparation and briefing. However, any case pending before the court is eligible for the program. Settlement conferences are set as quickly as possible to avoid appellate delay. Settlement briefs are not always required and are encouraged to be short.

The program has proven to be very worthwhile. The settlement officers are provided by the court, free of charge. The cases that successfully settle vary widely, from complex litigation on its second or third round before the appellate court to the small claim that keeps wanting to be big claim. Clients are impressed when the settlement is placed on record in the Supreme Court courtroom!

If your appellate case has been overlooked, you are encouraged to call the court and let the clerk know that you would like to be contacted by a screening officer to discuss settlement.

Margaret Newman is the coordinating officer of the program. She can be reached at 264-0864. Questions or comments about the settlement program may be directed to Clerk of Appellate Courts Marilyn May, 264-0608, 303 K Street, Anchorage, AK 99501.

ALTERNATIVE DISPUTE RESOLUTION

FROM ADVOCATE TO NEUTRAL:

# Reflections on a personal & professional transformation

*By Thomas P. Owens, Jr.*

On Jan. 1, 2006, at age 67, I completed the sale of my interest in the law firm that I had founded some 35 years ago and began a new career as a mediator, arbitrator, conflict consultant and life transition coach.

Most aspects of our lives are in a constant state of transition and change. Our professional endeavors and careers are not exempt from this fact of living. We invest huge amounts of time, energy and personal sacrifice as we establish ourselves in a particular niche in the legal profession, but that established niche – enjoyable as it may be, and mine certainly was – is subject to change, because we change as we live our lives.

**Most aspects of our lives are in a constant state of transition and change.**

This brief article summarizes my thinking about the personal and professional transformation I have experienced as I have transitioned from professional advocate to professional neutral – from gunfighter to peace-maker. Perhaps some of the words written here will resonate with others who find themselves on the edge of transition and, perhaps, transformation.

I have intentionally used the term "transformation" because that is exactly what has happened in my case. When I entered law school, the dean told us in his welcoming remarks that the study of law would change the way we thought and the way we operated in the world. He was right. We lawyers are trained – actually indoctrinated – in problem solving and advocacy, and we function within a legal system that is economically based and advocacy driven.

That is the way most of us operate in the world and it was the way I operated in the world during a 40-year career as a practicing attorney. And, somewhere along the path of that career, my thinking and feeling about the system within which I was operating and my role in it began to change. Nothing unusual there – experiencing the system changes all of us. I suggest that the important thing is to expect, be open to and aware of these internal changes as they occur. In my case, I have experienced a fundamental change in the way I view conflict, which is the primary environment within which most attorneys operate.

How does a transformation of this mind-set and world view occur? The change usually isn't sudden and epiphany-like. Herminia Ibarra, writing in Working Identity: Unconventional Strategies For Reinventing Your Career (Harvard Business School Press, 2003), proposes that we do not decide what we want to become before we become – we decide as we go along, experimenting with and experiencing different ways of being and getting on in this world. It is not a linear pathway toward some sort of predetermined professional and personal identity that is different from the one we presently have – it is a matter of experimenting with "possible selves."

For me, the transformation manifested as a declining interest in "winning" the dispute or negotiation in which I and my client were involved and a growing fascination with the nature of the dispute itself. The reader may experience some other fundamental change in world-view, depending on the different inclinations that are emerging. However, I think a common element of these kinds of change is a shift in our view of human interaction.

If you are inclined toward mediation as a different career, be prepared to unlearn a great deal of what your education, indoctrination and experience have taught you about how the world works. "Reality," as viewed through the lens of the legal system is considerably different than reality as viewed through other, equally distorted lenses.

Remember that you are coming from a tradition that is grounded in economics and advocacy. Understanding how people and their organizations have communicated themselves into, and gotten stuck in, a dispute becomes more important than understanding how the legal system may deal with that dispute, if the dispute is even in the gravitational field of the legal system.

You will come to view each dispute, not as a fixed state of affairs, but as an emergent, interactive process. And, you will discover that "choosing sides" was much easier than maintaining neutrality and a helping mentality toward all parties – at least initially. In the final analysis, I have found the neutral/helping role to be much more rewarding than "winning" any jury trial or negotiation. Know that if you are to become an effective mediator, it will involve much more than learning about a process over which the mediator presides, it will involve a sea change in your thinking and believing about human interaction.

**You will come to view each dispute, not as a fixed state of affairs, but as an emergent, interactive process.**

Transitioning to another orientation should not be a spur-of-the-moment enterprise. If you are aware of your changing ideological stance, you should prepare in advance for the transition that you know will be coming. Perhaps that preparation will involve formal education or perhaps it will involve gaining practical experience with the nuances of the new endeavor. In any event, moving forward into the future is preferable to hanging on to the past when you and your world view are in transition. At a minimum, this approach replaces the psychic pain of cognitive dissonance with apprehension of the unknown, which is a transitory state that more readily dissipates – hanging on just gets more difficult as time goes by.

Moving forward into the future is easier said than done. You may be leaving a hard-won, emotionally and economically satisfying aspect of your life in favor of a professional and personal life with many unknowns and uncertainties.

Your spouse, significant other or professional colleagues may not understand or support you in your transition or understand your transformation. You will learn a new respect for the old saying that we "always prefer the devil we've got to the devil we may get." There will be the urge to keep one foot on the diving board, rather than diving head first into the pool.

But, all of the first person accounts I have read about transitioning from "advocate" to "neutral" observe that it is extremely difficult, if not impossible, to maintain a professional life as both advocate and neutral. That has been my experience also.

It has been both humbling and invigorating to "wait for the phone to ring" like I did 40 years ago. My sea change has been exciting. Moving to a new location and starting a new career has forced me to jettison four decades worth of accumulated paper and pretenses. I am reminded of a well known Alaska lawyer, now deceased, who made it a practice to have a "court house fire" every four or five years to get rid of all of the old open matters that had become fallow. Although he got away with it then, I think nowadays, changing careers is probably easier, safer and a lot more fun.

*Thomas P. Owens, Jr. may be reached at tomowens@mediate.com . His web page appears at www.mediate.com/owens*

# Structuring the attorney-client relationship: How (and why) to make your practice ADR-friendly

*By Stuart W. Goering*

Maybe you were already a fan of Alternative Dispute Resolution (ADR), or perhaps you have been converted by this issue of the *Bar Rag*. No matter how long you've thought it was a great idea, many of us still find it difficult to incorporate ADR principles into practice. We're used to the adversary system, and ADR demands some re-thinking of that process. But with planning and a few relatively minor adjustments, that can change.

**We all "know" the traditional attorney-client relationship, but tradition doesn't always equate with necessity.**

We all "know" the traditional attorney-client relationship, but tradition doesn't always equate with necessity. Sometimes discretionary aspects of this relationship can hinder the use of ADR. However, there is no ethical or legal reason not to adapt the structure of the attorney-client relationship to ease the use of ADR, and many reasons to do just that.

Your practice can be more ADR-friendly before you even meet your next client. If you have a brochure, advertising or a web site, consider adding ADR information. An easy step is to link to or reference the ADR information on the Alaska Court System's web site. If you offer mediation or other ADR services, say so. If you don't currently do so, consider offering services like settlement review and consulting to support your clients' ADR efforts, even when you aren't appearing at a mediation, arbitration or conference on their behalf.

ADR should also be part of the intake/screening process. If you have paralegals or other non-attorneys do your initial screening, train them to identify situations that might be suitable for ADR. If your practice is primarily transactional, this might not seem necessary, but nearly everyone sees disputes from time to time, and real estate deals gone bad, as well as the odd will contest or family trust issue may actually be ideal candidates for ADR.

The decision to proceed with representation shouldn't end consideration of ADR. Just as litigation is often discussed during the initial consultation, help your client understand their ADR options, as well. Even when it doesn't seem appropriate at first, it may become more attractive as the costs of litigation become a reality for the client or their opponent. Having discussed it up front makes resort to ADR seem less a reaction and more a plan if events make it advantageous after all.

One stumbling block can be a contingent fee agreement, since the attorney may have less control over the outcome in ADR. Even if the result is good for the client, the recovery may be a compromise and might not provide for attorney's fees. Naturally, an attorney facing the potential loss of a fee will be reluctant to recommend ADR, no matter how beneficial to the client, if that attorney already has a substantial investment of time in the case. The solution is to specifically include ADR options in the agreement with the client. For example, include a time and expenses-based fee calculation that is used, regardless of outcome, if the client elects ADR. Or, the client could agree to seek specified attorneys fees as part of a mediated or negotiated settlement.

Addressing ADR may seem unnecessary if your fees are not contingent. After all, the client agreed to pay for your services no matter the outcome or process. However, most ADR processes generate far fewer overhead-type expenses, like document reproduction, paralegal and secretarial time. Malpractice exposure may be lower, too, resulting in reduced malpractice insurance premiums over time. Consequently, you might be able to offer a lower hourly rate to clients who elect ADR, and still remain profitable.

If you've read this far, you may wonder why you'd want to do any of this. After all, your practice is prob-

***Continued on page 29***

# Employment dispute resolution - EDR 101

*By Linda M. O'Bannon*

EDR for "employment dispute resolution" and ICMS for "integrated conflict management systems" are relatively new terms for alternative dispute resolution within the field of employment. This article will focus on pre-litigation EDR and the use of mediation in the employment context. The author is a strong advocate of the use of "transformative mediation" in pre-litigation employment conflicts, having practical experience and training in this style of mediation and having digested some of the literature and research supporting the "transformative" approach to mediation.[1]

**This article will focus on pre-litigation EDR and the use of mediation in the employment context.**

Beware all of you bottom-line types who are used to the shuttle diplomacy mediation model conducted by many sitting and retired judges to forge a settlement between an injured party and a defense funded by an insurance company. This article, in contrast, will delve into the touchy-feely arena. In the context of a personal injury or other civil litigation settlements, the mediator often appropriately employs a directive style to foster a final conclusion to the litigation. In that directive style of mediation the focus is on the final outcome. In the 40 hour basic mediator training I completed with the Arizona Dispute Resolution Association several years ago, one of the suggested mediation ground rules was to "focus on future actions, not past ones," which apparently is a concept routinely taught in the basic mediation courses.

**. . . mediators have come to recognize that parties often need to tell their story to make any progress towards settlement.**

Yet, even directive style major litigation mediators have come to recognize that parties often need to tell their story to make any progress towards settlement. One of the 10 mistakes even good mediators make, according to a corporate and securities law mediator, is: "Permitting settlement negotiations to begin prematurely - i.e., prior to permitting the parties to vent, or prior to risk analysis and reality testing." [2]

Many in the ADR field have now come to believe that the directive style of mediation is not beneficial in situations in which the relationship between the parties or individuals will continue after the mediation and the parties require a cooperative workable relationship to function. The problem solving approach, in which reaching an agreement is the primary goal, can neglect the higher potential of mediation, that is changing the interactions of people (the transformation) who are in conflict. A mediator employing a transformative model will allow the parties to vent and express emotions freely while employing certain techniques to encourage the parties to recognize the other's viewpoint.

In the context of EDR, the technique is especially helpful in situations in which two (or more) persons will continue to work together after the conclusion of the mediation. Examples of the type of conflicts which are ripe for such an approach include the following. [3] Two different department heads are required to interact to accomplish the corporation's goals, but recently cannot seem to cooperate. Their mutual supervisor determines that mediation should be employed. A directive mediator, being focused on the final agreement and trying to specify the ways in which the two employees must cooperate and to detail the same in a written agreement, may miss the underlying conflict. The transformative method mediator would instead be hoping to discover the origin of the conflict and would allow time for and empower the individuals to reveal the source of the conflict. In this example it might be discovered that the two department heads were good friends at one time and ate lunch together almost daily. Both are confused and hurt over the turnabout of their relationship and have since engaged in spiteful conduct, now boiling over into dysfunction in their work responsibilities. One of the employees had suddenly withdrawn from their lunches and the other one retaliated in work situations for the imagined rejection of her friendship, which escalated into their work feud.

The reasons for one's withdrawal from their mutual lunches were a combination of expanded work responsibilities and the one employee's health concerns for both herself and her niece, also employed at the corporation. Thus, she and her niece had embarked on a walking routine at lunch three days per week and the two other days were spent working through lunch to meet her additional workload. She, however, had failed to communicate these changes to her workmate and former lunch partner. The mediator listening carefully hears one of the women express regret at their lost friendship and the mediator verbally recognizes the emotion and asks the other if she heard that expression of regret. This comment leads to mutual expressions of regret over their lost friendship and mutual apologies. Ultimately a written agreement of cooperation is obtained with each department head offering up many ways in which one can help the other. More importantly the actual rift was healed and both parties worked towards rebuilding their friendship and work relationship. In other words a transformation of the relationship for the better occurred as a result of the mediation.

**More importantly the actual rift was healed and both parties worked towards rebuilding their friendship and work relationship.**

A more typical example of a work situation in which a mediation may be the best form of alternative dispute resolution is a conflict between a supervisor and supervisee in which the supervisor cannot understand the change in attitude of his underling.

**The mediator makes use of techniques such as paraphrasing and checking with the participants as to the meaning or implied meaning of their statements.**

In mediation it is determined that the supervisee is very angry that he was not selected for a recent promotion. In mediation the supervisor explains that the union rules for their shop required a senior employee be promoted (or that he did not get to make the decision, rather it was made by a manger the supervisor reports to, or other reasons that have nothing to do with wanting to by-pass the supervisee for promotion.). The mediator picks up on the supervisor's expressions of confidence and appreciation of the supervisee and emphasizes those. Once the supervisee understands that his supervisor considers him a good worker and has not intentionally overlooked him, the supervisee withdraws the discrimination complaint that he had filed against his supervisor and they continue to enjoy a good working relationship.

Another potentially emotionally charged employment situation occurs in family owned businesses. Many of us have been involved in litigation among family members, which can become brutal to all concerned (even the attorneys). Mediation can be a much cheaper, quicker method of conflict resolution in these situations. A mediator who tries to suppress the emotional tenor of the family conflict spilling over into the work is like the proverbial boy with his thumb in the dike. Most family members would prefer to resolve their family business conflicts in such a way as to preserve the familial relationships.[4] Dissolution of family businesses or the consequences of a death of a leader in a family owned or closely held corporation can also be facilitated by mediation.

What sort of techniques does the EDR transformative model mediator employ? First and foremost the mediator must have an ideology of respect and display that respect towards those participating in EDR. The mediator is not the star of the show; the participants are. After the first five to 15 minutes, the participants should be doing 90% of the talking and should be talking directly to each other. Generally the mediator allows the participants to resolve their conflicts with subtle facilitating. The mediator respects and recognizes the autonomy of the participants to resolve their conflict. The goal of the third-party neutral mediator in transformative mediation is to enable the parties to work through their own conflict.

It is important in EDR that the mediation be confidential and that it is not on the record. It is also mandatory that the participants understand that the mediator is not making a decision as to who is right or wrong or any type of disciplinary determination. The mediator should honor the participants with a belief (unless proven otherwise) that the participants can reach their own understanding. The mediator makes use of techniques such as paraphrasing and checking with the participants as to the meaning or implied meaning of their statements. In some ways the mediator acts as a combination of facilitator, counselor and life coach, but always in the context of respecting the individual. In real estate the phrase "location, location, location" is always meaningful. In mediation the phrase is "listen, listen, listen". A mediator cannot listen if he or she is always talking.

Sometimes I have thought that any success in my employment mediations is due in large part to the factor of just having the two parties in the same room wherein the parties are afforded the opportunity to talk face to face without the interruptions of the everyday work demands. It is the most wonderful joy to have two parties at the end of a mediation who are very happy to have participated and who have sincerely worked out their

*Continued on page 30*

# Structuring the attorney-client relationship

*Continued from page 28*

ably doing just fine as it is. Consider these three reasons to make your practice ADR-friendly:

1. If you refer a potential client for successful ADR, you've generated good will for yourself and our profession, even if the client was unable to afford your representation, or the value of the case would have made a contingent fee arrangement unprofitable. If you provide some services, such as reviewing the settlement, your bonus is fees from a case that normally wouldn't have generated any.

2. If you use ADR methods in the right situations, you may be able to resolve marginal cases faster and with less effort, leaving you more time for other, more interesting and, possibly, profitable cases.

3. If you don't advise ADR when it is appropriate, you may face an irate client who hears of, or sees, a better outcome obtained using ADR in another, similar case. How will you explain why you didn't use a faster, less expensive method that may leave more resources available to the parties to fund an eventual settlement when it was available? In other words, do you want to try to justify a worse outcome achieved at greater cost than was necessary?

Certainly the benefits to society as a whole (such as reduced court congestion and greater satisfaction with the legal system) are worth your consideration, too. But really, the most compelling reason to use ADR may be that it can make your practice more enjoyable and profitable with less stress.

ALTERNATIVE DISPUTE RESOLUTION

# Mediation in the federal courts began in '70s

*By Herb Ross*[1]

The birth of mediation programs in the federal courts is often attributed to Frank E.A. Sander,[2] a law professor at Harvard who wrote a paper in the 1970's advocating the "Multi-Door Courthouse." The paper proposed that court systems should provide disputants with the most appropriate forum for the resolution of their dispute (stated colloquially as "fitting the forum to the fuss"); the forum most suitable was often not traditional litigation. Sander presented his paper at a seminal conference in St. Paul in April 1976, the Pound Conference – formally known as the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice. [3]

After this conference the federal courts began a steady process of civil justice reforms to modernize, simplify and make more effective the processes used by the courts to resolve disputes. These included discovery and case management reforms and, of course, an increasingly favorable view of the use of alternative dispute resolution procedures. [4]

**Along the way Rules 16 and 26(f) of the Federal Rules of Civil Procedure were promulgated to promote alternative dispute resolution processes.**

Along the way Rules 16 and 26(f) of the Federal Rules of Civil Procedure were promulgated to promote alternative dispute resolution processes. FRCP 16 is the pretrial, scheduling and case management rule. One of the stated purposes of the pretrial conference is "facilitating settlement of the case." One of the subjects to be considered at a pretrial conference is "settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rules." FRCP 26 is a general rule regarding discovery and the duty of disclosure, FRCP 26(f) is a "meet and confer" requirement that parties are to meet before the pretrial conference regarding scheduling, discovery and "to consider . . . the possibilities for a prompt settlement or resolution of the case . . ."

In 1998, Congress gave its approval – indeed, its mandate – to the

*Continued on page 31*

# Employment dispute resolution - EDR 101

*Continued from page 29*

disagreements. That moment when one participant actually recognizes the viewpoint of the other is magical and leads to the transformation of their relationship.

Well all of this is mighty nice, you might say, but what are the results and is it cost effective? The United States Postal Service (USPS), the largest federal civilian employer, implemented an award-winning mediation program - REDRESS (Resolve Employment Disputes, Reach Equitable Solutions Swiftly), utilizing outside neutral mediators and available to all postal employees in this country as of July 1999. The program uses the transformative mediation model advocated by Bush and Folger in *The Promise of Mediation.*

**Well all of this is mighty nice, you might say, but what are the results and is it cost effective?**

Professor Lisa B. Bingham, Director of the Indiana Conflict Resolution Institute at Indiana University has been evaluating the REDRESS program and other EDR programs. She reported in an article in the Spring 2002 ACResolution magazine devoted to "Conflict Resolution in the Workplace" on the impressive results of the REDRESS program.

More than 90 percent of all participants, including complainants, respondents, and their representatives, report they are satisfied or highly satisfied with the REDRESS process and mediators. More than 65 percent report they are satisfied or highly satisfied with the outcome of mediation. These rates have held steady through the period of the program.[5]

Professor Bingham also noted in 2002 that the REDRESS case closure rate exceeded 80 percent and that over 11,500 REDRESS mediation sessions were held each year. Since the initiation of the REDRESS program the number of formal EEO complaints filed by USPS employees dropped significantly. Further 70 to 75 percent of all employees offered the option to mediate elected to participate in REDRESS. [6] In 2004 it was reported that the USPS REDRESS program continued to report over 90 percent satisfaction rate with its mediation and its outside mediators over a period of five years with ten thousand to fourteen thousand cases per year.[7]

Social science researchers have been comparing and quantifying various methods of dealing with employment conflict. While there is still much research and scientific study to be completed in the EDR arena, there is much data to make some conclusions on the efficacy of various methods of dealing with employment conflict. "The evaluation and field research literature suggests that mediation produces better organizational outcomes than either no intervention or an adjudicatory one like arbitration."[8]

There have been efforts, especially in the federal agencies, to identify the cost savings when the government uses EDR. For example it is reported that the Justice Department spends an average of $1,007 to mediate and $17,000 to litigate the "typical" case. The U.S. Air Force has "estimated that it saves $14,000 and 276 labor hours when it uses EDR."[9] Thus, there is some empirical evidence of the cost benefit of EDR mediation.

As practicing attorneys representing employers you may be consulted about an integrated conflict management system (ICMS). A good ICMS is "a coordinated network of options available to people for resolving conflict in an organization." A good ICMS "should be easily accessible to address disputes at the earliest time, at the most appropriate level, and in the most appropriate manner." [10] A full discussion of ICMS is beyond the scope of this article, but in giving advice to clients, attorneys should know that there are many reputable consultants in the field with experience in setting up successful ICMS. What you do not want to help a client to do is to set up an ineffective ICMS. For example, employers sometime adopt binding arbitration in which they use the same arbitrator repeatedly who always sides with management. Or a corporation might employ a single Ombudsman within the corporation to deal with employee disputes, but who is not trusted by the employees. While there may be short term gains from such programs, the damage to employee morale and the cost of employee turnover can easily offset the short term gains.

**In my opinion and that of many who practice in this field, a system of conflict resolution that respects the individuals and fosters learning in conflict resolution is desired.**

It appears to be conceded in the ADR field, that more research is needed on what dispute system design is "most effective for enhancing interest-based dispute resolution, improving workplace climate, increasing productivity, and reducing rights based complaint filing." The case, however, has been made in the substantial and growing body of research for the use of mediation, as compared to arbitration in employment disputes. Mediation "is perceived as fairer and consistently produces high satisfaction and settlement rates among disputants, and there is growing evidence that a well-designed program may produce efficiencies in terms of dispute processing time and early resolution of employment-related conflict." To date the research has not shown that "arbitration produces these efficiencies."[11]

**". . . there is growing evidence that a well-designed program may produce efficiencies in terms of dispute processing time and early resolution of employment-related conflict."**

Professor Bingham also asserts that there is preliminary evidence "that mediation produces upstream effects in terms of disputants' conflict management skills" and notes that such evidence does not exist for arbitration. Many in the field, including this author, believe that conflict resolution or peacemaking can be learned by experiencing it.

One of the big gaps in the research on alternative dispute resolution, including, EDR, is the effect on the quality of justice. Some have suggested that the dramatic shift in resolution of disputes from public to private forums has privatized our system of justice, perhaps to the detriment of some of the participants. In EDR, the question to be asked is has the employment dispute resolution strengthened or weakened employee rights and our system of social justice? These are not easy questions to answer and ones that should be analyzed "on the basis of rigorous empirical analysis."[12]

In our present society, the workplace is very often the center of an individual's life, where the individual spends the majority of her working hours and can be tethered to that workplace through technology 24/7. Work is often the source of many of the individual's social contacts and emotional supports. In my opinion and that of many who practice in this field, a system of conflict resolution that respects the individuals and fosters learning in conflict resolution is desired. As transformative mediation by neutral third parties has been shown to be the most successful form of EDR to date, it is worthy of practice and support.

**ENDNOTES**

[1]The transformative mediation model was advocated and described in detail in a 1994 book: *The Promise of Mediation* by two professors: Robert A. Baruch Bush and Joseph P. Folger. A somewhat similar method of mediation is advocated in: *Narrative Mediation* by John Winslade and Gerald Monk of New Zealand and published in 2000. The author is a contract neutral third party mediator in the USPS REDRESS program, which uses the transformative mediation model.

[2]New York lawyer, Stephen A. Hochman also advocated patience in his list of the 10 mistakes. *See ACResolution* (a quarterly magazine of the Association for Conflict Resolution), *p. 15 (Spring 2002).*

[3]These examples are fictionalized versions of mediations I have participated in or case studies or role playing performed in training. To the extent they are based on real situations, they are purposely disguised to protect all confidentiality. An article entitled: "Ten Tips for Negotiating Workplace Conflicts" by a California mediator (Jeffrey Krivis) appeared in the July-September 2006 *Alaska Bar Rag*, pp. 24-25. Mr. Krivis' article gave other examples of workplace conflicts that can be mediated.

[4]As in all mediation, the mediator must be aware of power imbalances, especially those situations which most likely should not be mediated such as mediation between a sexual abuser and victim. The mediator is not a substitute for family therapy.

[5]Bingham , Lisa "REDRESS at the USPS - A Breakthrough Mediation Program," **ACResolution**, p. 34 (Spring 2002).

[6]*Id.*

[7]Lisa B. Bingham, Employment Dispute Resolution: The Case for Mediation, 22 CONFLICT RESOLUTION QUARTERLY 145, 148 (Fall-Winter 2004)( The combined fall-winter 2004 quarterly was entitled "Conflict Resolution in the Field, Assessing the Past, Charting the Future.").

[8]*Id.* 146.

[9]*Id.* 148.

[10]The quotes in this paragraph are all from Bingham's article cited above at pages 150-151.

[11] *Id.* 168.

[12]See generally, David B. Lipsky and Ariel C. Avgar, *Commentary: Research on Employment Dispute Resolution: Toward a New Paradigm, 22* CONFLICT RESOLUTION QUARTERLY 175-189 (Fall-Winter 2004).

# Mediation in the federal courts began in '70s

*Continued from page 30*

use of ADR by federal trial courts. It adopted the Alternative Dispute Resolution Act of 1998 (28 USC §§ 651-658). The Act requires every district court to establish at least one ADR process and promulgate local rules (including rules about confidentiality, conflicts of interest for neutrals, the administration of an ADR program, and supervision of neutrals). This was one of those unfunded federal mandates; no additional federal funding was offered with the Act. The Act applies to bankruptcy courts, too.

One other phenomenon should be mentioned. It exists in state courts, too, but is even more pronounced in federal courts. That is the issue of "the vanishing trial." Less than 2% of civil cases filed in federal courts reach an actual trial.[5] So, if so few cases are going to judges or juries to make the ultimate decision at the trial level, the parties must be doing it themselves by agreement or throwing in the towel. One of the selling points for the use of ADR in federal courts is to have these voluntary case-ending decisions made at an earlier stage before so much of the transaction costs (attorney fees and other trial preparation costs) have been expended.

So, what type of ADR programs exist in the federal trial courts? There is great diversity in the programs among the 94 districts (91 standard districts and 3 districts in U.S. territories), many of which were mature long before the 1998 ADR Act. For example, the robust program in the Northern District of California (San Francisco and environs) has been developing since about 1985, under the pioneering vision of late district judge Robert Peckham. Go to the website for the ADR program in that district – http://www.adr.cand.uscourts.gov – and you will see a model of what ADR can be when supported by the local judges. A full time staff is dedicated to the operation of the ADR program. The staff oversees the selection, training, monitoring, and evaluation of neutrals for the program. A variety of ADR vehicles are offered by the court: mediation, early neutral evaluation, arbitration and settlement conferences. Previously, the program offered mini-trials. The booklet produced by the district is an excellent primer for anyone interested in court-connected mediation.[6]

**Our local district judges often suggest or direct settlement conferences or meditations with senior or active district judges.**

Other districts have excellent programs, although more modestly structured. For example, the district court in New Jersey, without much funding, developed a great mediation program which is administered by Magistrate Judge Ron Hedges. The Bankruptcy Court for the Central District of California, one of the busier bankruptcy courts in the country, also has a mature program which has mediated thousands of cases for that court.[7]

Alaska responded to the ADR Act of 1998 by adopting District of Alaska Local Rule 16.2.[8] The caseload in the district court in Alaska is much lower and our federal ADR program is, likewise, much more modest than the one in the Northern District of California, for example. Our local district judges often suggest or direct settlement conferences or meditations with senior or active district judges. These have been conducted during the past year by District Judges von der Heydt, Holland, Beistline or Burgess, as well as Magistrate Judge Pallenberg and myself, Bankruptcy Judge Ross.

Out of 15 cases referred to settlement conferences nine settled, five did not, and one is still in the process. A number of cases undoubtedly are mediated by private mediators at the volition of the parties, but no statistics are kept for those. Electronic case filing reports that 238 civil cases were filed in 2006.

Throughout the federal district courts, there is a wide variety of ADR programs. Some are extensive, providing training, oversight, and monitoring. Some are simpler, like Alaska's. Some are free to the parties, and others require the parties to pay (if they are able). Some provide a certain number of free hours and then require payment of the neutrals if the parties want to continue. Some are mandatory (requiring the parties to attend in good faith, but can not be required to settle), and others are purely voluntary. A lot depends on the local legal culture. The bar in many districts are still wary of mediation (too "touchy-feely"), while others adopt it wholeheartedly.

As mediation becomes more mainstream, I would expect its use to increase. Large corporations and insurance companies, interested in controlling burgeoning litigation costs, are becoming advocates of the mediation process. [9]

**Throughout the federal district courts, there is a wide variety of ADR programs. Some are extensive, providing training, oversight, and monitoring. Some are simpler, like Alaska's.**

### ENDNOTES

[1]The views in this article are those of the author's, and do not necessarily reflect the views of the U.S. District Court of Alaska, nor any other federal court or the Administrative Office of United States Courts.

[2]Professor Sander still teaches at Harvard Law School in the area of mediation and alternative methods of dispute resolution.

[3]*Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, Jeffrey W. Stempel, 11 Ohio State Journal on Dispute Resolution 297, 309-34 (1996).

[4] *Id.*

[5]*Vanishing Trials: the New Age of American Law,* Elizabeth Warren, 79 Am. Bankr. L.J. 915 (Fall, 2002).

[6]The booklet can be be found by going to the ADR website (http://www.adr.cand.uscourts.gov) and looking for the link "Dispute Resolution Procedures in Northern District of California Booklet").

[7]*See,* the court's mediation website at http://cacb.uscourts.gov, click on "Information," and then click on "Mediation Program."

[8]*See,* the local rules on the website for the US District Court for State of Alaska at http://www.akd.uscourts.gov/reference.htm. D Ak LR 16.2 reads as follows:

Rule 16.2 Alternative Dispute Resolution

(a) Policy Favoring Settlement by ADR Methods.

(1) *Mediation.* The court favors resolution of cases by negotiation to reduce litigation expense. To this end, the court promotes the use of mediation.

(2) *Other ADR Processes.*

[A] Other Alternative Dispute Resolution (ADR) processes may be used where agreed by the parties, including early neutral evaluation, arbitration, settlement conference, summary jury trial, and mini trial.

[B] The court will not make its personnel or facilities available for summary jury trials or mini trials and will not summon jurors to participate in those proceedings.

(b) Use of ADR Processes.

(1) *Early Consideration of ADR Processes.* At an early stage in every case, the parties must actively consider mediation or other ADR processes to facilitate, less costly resolution of the litigation.

(2) *Coordination of ADR With Case Management Rules.* At the meeting of parties under Rule 26(f), Federal Rules of Civil Procedure, and any conference regarding case management under Rule 16, Federal Rules of Civil Procedure, litigants must discuss the advisability of using mediation or other ADR processes.

(c) Adoption of ADR Process in a Particular Case.

(1) *Mediation*. The court may order mediation:

[A] upon request of the parties, or one of them; or

[B] on the court's own motion.

(2) *Other ADR Processes.* In addition to mediation, the parties may stipulate, subject to court approval (and, in the case of arbitration, 28 U.S.C. §§ 654-658), to use any appropriate ADR process.

(d) Timing of Mediation. Unless otherwise ordered, mediation ordered by the court must be conducted within ninety (90) days after the issuance of the initial case management order.

(e) Conduct of Mediation.

(1) *Use of Agreed Upon Mediator; Order*. Where the parties agree to mediate and on the choice of mediator, the parties must lodge a proposed order setting forth:

[A] the name and address of the mediator;

[B] whether mediation statements—

(i) are to be submitted to the mediator,

(ii) are to be shared or confidential,

(iii) any limitation in length, and

(iv) when they are to be submitted;

[C] the mediator's fee schedule and required payment arrangements, including how the parties will allocate those costs;

[D] the time and place the mediation is to commence and time available; and

[E] the name and position of the principal who will attend, who will normally be someone with authority to approve a settlement or one with substantial influence in whether a settlement should be approved (in which case, someone with authority should be readily available to ratify a settlement).

(2) *Selection of Mediator by the Court; Order.*

[A] If the parties cannot agree upon the mediator, the court may order that they mediate before a United States district, bankruptcy or magistrate judge, including a senior judge or retired judge, who is not assigned to the case and who consents to serve.

[B] The judge will have the same duties, powers and rights as any other mediator under these rules, except as otherwise noted in this rule or as required by statute.

[C] Upon selection, the parties must meet with the mediating judge and lodge an order similar to that required under paragraph (e)(1), except the order will not provide for payment of compensation to the judge for acting as a mediator.

(3) *Mediator's Report of Results of Mediation.*

[A] Upon conclusion of the mediation, the mediator must promptly file a report indicating whether the case has settled in whole or in part, whether any follow up is scheduled, and any additional information that all parties have agreed in writing should be included in the report.

[B] The parties or their counsel must sign the mediator's report and any separate document setting forth their agreement, which, following an appropriate motion, the court may allow to be filed under seal.

(4) *Implementing a Settlement.*

[A] If the mediation results in settlement, the parties must lodge appropriate closing papers, or in the case of a partial settlement, papers appropriate to accomplish the partial settlement, within thirty (30) days from the filing of the mediator's report.

[B] Upon written request filed within thirty (30) days, the court may enlarge the time within which to file the appropriate closing papers.

(f) Confidentiality of Mediation Communications. This subsection applies to communications, during, preliminary to, or after all mediation sessions.

(1) *Communications by the Mediator.* No communication by a mediator may be disclosed by any person unless all parties to the mediation and the mediator consent.

(2) *Communications by Others.* A communication made by a person other than the mediator may be disclosed by a person other than the mediator only if all parties consent in writing.

(3) *Mediation Statements.* Mediation statements submitted to the mediator in confidence or shared with other mediation parties:

[A] may not be disclosed to anyone else without the parties' express consent; and

[B] are not admissible in evidence in any proceeding related to subject matter of the mediation.

(4) *Unprotected Communications.* Notwithstanding paragraphs (f)(1) and (f)(2), a communication is not protected to the extent that disclosure is required by state or federal law.

(5) *Court May Authorize Disclosure.* Notwithstanding paragraphs (f)(1) and (f)(2), a communication may be disclosed if the court, after a hearing, determines that:

[A] disclosure does not circumvent Rule 408, Federal Rules of Evidence and Rule 68, Federal Rules of Civil Procedure;

[B] disclosure is necessary in the particular case to prevent a manifest injustice; and,

[C] the necessity for disclosure is of sufficient magnitude to outweigh the importance of protecting the general requirement of confidentiality in mediation proceedings.

(6) *Application to Associates and Staff.*

[A] Disclosure of confidential information to the staff and associates of the parties, their counsel, or the mediator, may be necessary to accomplish the mediation.

[B] All staff and associates are subject to this confidentiality rule.

(g) Conflicts of Interest.

(1) *Definition.* A conflict of interest for a mediator is a dealing or relationship that might reasonably be thought to create an appearance of bias.

(2) *Disclosure; Further Proceedings.*

[A] The mediator has a responsibility to disclose all dealings and relationships defined in paragraph (g)(1).

[B] If all parties agree, in writing, to mediate after being informed of all actual, apparent, or potential conflicts of interest, the mediator may proceed with the mediation; otherwise the mediator must decline to proceed.

(h) Immunity of Neutrals.

(1) Any private person serving as a neutral under this rule is deemed to be performing a quasi-judicial function and is entitled to the immunities and protections that the law accords to persons serving in that capacity.

(2) United States district judges, bankruptcy judges, magistrate judges, senior judges, and retired judges are entitled to absolute judicial immunity while serving as neutrals.

(i) Compensation. Unless the parties agree or the court orders otherwise, the cost of mediation will be borne equally by the parties.

(1) The mediator will advise the parties of the mediator's fee schedule and required payment arrangements so the parties can include this information in the proposed order required by paragraph (e)(1).

(2) [A] If the expense of mediation or any matter regarding compensation creates issues that the parties, among themselves or with the mediator, cannot agree upon, the parties or the mediator may ask the court to resolve the matter.

[B] In doing so, the court will take into consideration the relative financial condition of the parties.

(j) Administrator. The chief judge of the district will designate an employee or judicial officer of the district to act as the Administrator of the court's mediation program.

(k) Selection of Mediators and Other Neutrals; Roster of Neutrals. The court recognizes that the parties have control over their own neutrals.

(1) The court expects any private person who agrees to serve as a neutral to have training or experience commensurate with the responsibility undertaken.

(2) In court-connected and other forms of mediation, it is desirable that the mediators selected by the parties have the requisite training and experience.

(3) The court does not:

[A] investigate and approve mediators and other neutrals; or

[B] create and maintain a roster of neutrals.

(l) *Definitions.* The term Alternative Dispute Resolution (ADR) refers to any method other than litigation for resolution of disputes. Definitions of some common ADR terms follow.

*Neutral* – The term "neutral" as used in these rules refers to an impartial person who facilitates discussions and dispute resolution between parties in mediation, case evaluation or early neutral evaluation, and arbitration, or who presides over a settlement conference, summary jury trial or mini trial.

*Mediation* – Mediation is a process in which a neutral facilitates settlement discussions between parties. The neutral has no authority to make a decision or impose a settlement upon the parties. The neutral attempts to focus the attention of the parties upon their needs and interests rather than upon rights and positions. Although in court-annexed or court-referred mediation programs the parties may be ordered to attend a mediation session, any settlement is entirely voluntary. In the absence of settlement, the parties do not lose the right to a jury trial.

*Arbitration* – Arbitration differs from mediation in that an arbitrator or panel of arbitrators renders a decision after hearing an abbreviated version of the evidence. In non-binding arbitration, either party may demand a trial within a specified period. The essential difference between mediation and arbitration is that arbitration is a form of adjudication, mediation is not.

*Case Evaluation or Early Neutral Evaluation* – Case evaluation or early neutral evaluation is a process in which a judicial officer or lawyer with expertise in the subject matter of the litigation acts as a neutral evaluator of the case. Each side presents a summary of its legal theories and evidence. The evaluator assesses the strength of each side's case and assists the parties in narrowing the legal and factual issues in the case. This conference occurs early in the discovery process and is designed to "streamline" discovery and other pretrial aspects of the case. The early neutral evaluation of the case may also provide a basis for settlement discussions.

*Summary Jury Trial* – The summary jury trial is a non-binding abbreviated trial by mock jurors. A neutral selected by the parties presides, acting in the fashion of a judge. Principals with authority to settle the case attend. The resulting advisory jury verdict is intended to facilitate settlement negotiations.

*Mini Trial* – The mini trial is similar to the summary jury trial in that it is an abbreviated trial presided over by a neutral. Attorneys present their best case to party representatives with authority to settle. Generally, no decision is announced by the neutral. After the hearing, the party representatives begin settlement negotiations, perhaps calling on the neutral for an opinion as to how a court might decide the case.

[9]Practising Law Institute PLI Order No. H0-0057 July, 1999 Federal Pretrial Practice, Procedure and *Strategy Corporate Counsel's Guide: Legal Development Report on Cost-effective Management of Corporate Litigation*, Robert Haig Principal Author 610 PLI/Lit 177.